

STATE OF MICHIGAN  
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,  
Plaintiff-Appellee,

-vs-

ANDREW MAURICE RANDOLPH,  
Defendant-Appellant.

Supreme Court No.

Court of Appeals No. 321551

Circuit Court No. 13-33003FC-N

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**APPLICATION FOR LEAVE TO APPEAL**

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## **STATEMENT OF QUESTIONS PRESENTED**

- I. WAS MR. RANDOLPH DENIED A FAIR TRIAL AND HIS RIGHT TO CONFRONT THE WITNESSES AGAINST HIM WHEN TWO POLICE OFFICERS TESTIFIED ABOUT THE POSITIVE RESULTS OF A PRELIMINARY GUNSHOT RESIDUE TEST THAT WAS PERFORMED ON MR. RANDOLPH'S HANDS THE NIGHT OF THE SHOOTING EVEN THOUGH NEITHER OF THE TESTIFYING OFFICERS PERFORMED THE TEST, NEITHER WAS A QUALIFIED EXPERT IN PERFORMING OR EVEN KNEW HOW TO PERFORM THE TEST, AND THE TEST ITSELF RELIED ON JUNK SCIENCE THAT IS NOT GENERALLY ACCEPTED IN THE SCIENTIFIC COMMUNITY BECAUSE IT IS SO UNRELIABLE? WAS TRIAL COUNSEL CONSTITUTIONALLY INEFFECTIVE FOR FAILING TO OBJECT TO AND OTHERWISE CHALLENGE THIS TESTIMONY?

Court of Appeals answers, "No".

Defendant-Appellant answers, "Yes".

- II. DID THE COURT OF APPEALS ERR IN HOLDING THAT THE ERRONEOUS ADMISSION OF PREJUDICIAL HEARSAY REPORTS OF ALLEGED THREATS MADE BY MR. RANDOLPH DID NOT REQUIRE REVERSAL, EITHER UNDER THE PLAIN ERROR STANDARD OF REVIEW OR UNDER THE STANDARD OF REVIEW FOR INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS?

Court of Appeals answers, "No".

Defendant-Appellant answers, "Yes".

- III. DID THE COURT OF APPEALS ERR IN HOLDING THAT THE TRIAL COURT'S ERRONEOUS ADMISSION OF A HEARSAY REPORT OF A THREAT TO KILL ALLEGEDLY MADE BY MR. RANDOLPH ON THE DAY OF THE SHOOTING (ADMITTED OVER DEFENSE OBJECTION) WAS HARMLESS IN THIS CIRCUMSTANTIAL MURDER CASE?**

Court of Appeals answers, "No".

Defendant-Appellant answers, "Yes".

- IV. WAS MR. RANDOLPH DENIED A FAIR TRIAL WHEN AMMUNITION FOUND IN HIS POSSESSIONS ON THE NIGHT OF THE SHOOTING, GUNS FOUND AT HIS BROTHER'S APARTMENT, AND THE BALLISTICS TESTS PERFORMED ON THOSE GUNS, WERE ADMITTED INTO EVIDENCE, EVEN THOUGH THEY WERE FRUITS OF AN ILLEGAL SEARCH OF MR. RANDOLPH'S BELONGINGS THAT RELIED ON THE CONSENT OF A THIRD PARTY WHO DID NOT HAVE COMMON OR APPARENT AUTHORITY TO CONSENT? WAS TRIAL COUNSEL CONSTITUTIONALLY INEFFECTIVE FOR FAILING TO FILE A MOTION TO SUPPRESS THIS EVIDENCE?**

Court of Appeals answers, "No".

Defendant-Appellant answers, "Yes".

- V. WAS MR. RANDOLPH DENIED A FAIR TRIAL WHEN EVIDENCE ABOUT AMMUNITION FOUND AT HIS FATHER'S HOUSE ON THE NIGHT OF THE SHOOTING AND EVIDENCE THAT A FEDERAL ARREST WARRANT HAD BEEN ISSUED FOR HIS ARREST WERE ADMITTED EVEN THOUGH THEY HAD NO RELEVANCE TO THE CHARGES AT ISSUE AND SERVED ONLY TO ESTABLISH HIS PROPENSITY TO VIOLATE THE LAW AND TO POSSESS WEAPONS? WAS DEFENSE COUNSEL CONSTITUTIONALLY INEFFECTIVE FOR FAILING TO OBJECT TO THIS EVIDENCE?**

Court of Appeals answers, "No".

Defendant-Appellant answers, "Yes".

## **JUDGMENT APPEALED FROM AND RELIEF SOUGHT**

Andrew Maurice Randolph appeals from the Court of Appeals's November 24, 2015 unpublished opinion affirming his convictions for second-degree murder, discharging a firearm in a building, being a felon in possession of a firearm, and possession of a firearm during the commission of a felony after a three-day jury trial in Genesee County Circuit Court. (Court of Appeals per curiam opinion attached hereto as Appendix A; January 14, 2016 order denying reconsideration attached as Appendix B).

This was a circumstantial murder case involving a drive-by shooting of a house. There were no eyewitnesses and no confessions. Mr. Randolph was convicted and sentenced to life in prison on the basis of junk science, inadmissible hearsay testimony, impermissible character evidence, and physical evidence that was illegally obtained in violation of his constitutional rights. His trial attorney did not investigate the seemingly-scientific evidence, never considered filing a motion to suppress the physical evidence, and sat idly by while highly prejudicial and inadmissible hearsay and character evidence was admitted. Rather than challenge the evidence, the trial attorney opted to tell the jury that his client was a "jerk," an "ass," and an "insufferable" person who repeatedly threatened people. The trial judge failed to recognize the obvious and highly prejudicial evidentiary and constitutional errors, including one hearsay statement that the trial attorney actually objected to.

The Court of Appeals's decision to affirm Mr. Randolph's conviction was "clearly erroneous and will cause material injustice" if permitted to stand and is reason enough to grant an application for leave to appeal under MCR 7.305(B)(5)(a). But the sheer number and magnitude of the errors is not the only reason this Court should hear Mr. Randolph's case. This case also contains important, recurring issues that have significant public interest and involve legal principles of major significance to this state's jurisprudence. MCR 7.305(B)(2) & (3).

The prosecution relied on the results of a preliminary gunshot residue test that was performed on Mr. Randolph's hands the night of the murder to suggest that he had fired a gun

that day. This preliminary test is a dermal nitrate test that is a reincarnation of the old paraffin gunshot residue test that police discontinued years ago, because it was found to be scientifically unreliable. Courts around the country, including this Court in *People v Young*, 425 Mich 470, 500 (1986), have declared dermal nitrate tests to be scientifically unreliable when used to suggest that someone has fired a gun. The test only detects the presence of nitrates, which are readily available in the environment and are easily transferred to peoples' hands. For example, a person whose hands have come in contact with urine, tobacco, cosmetics, fertilizer, various detergents, cured bacon, and even the adhesive on staples could easily get a positive reaction on this test. The test cannot indicate whether a person has fired a gun.

Not only was the prosecution permitted, without objection, to present this test as affirmatively indicating that Mr. Randolph had fired a gun on the day of the murder; it was also permitted to enter the results of this test into evidence through the testimony of two police officers who knew nothing about the science of the test, did not perform the test themselves, and were not qualified experts. Rather, they testified as surrogates to the hearsay conclusions of the technician who performed the test. The technician herself never testified and Mr. Randolph never had an opportunity to cross examine her.

The presentation of junk science testimony through the hearsay statements of lay, surrogate witnesses who lack any personal knowledge as to how the test is performed is impermissible under Michigan Rules of Evidence 401, 402, 403, 602, 701, 702, and 802 in addition to violating Mr. Randolph's fundamental constitutional right to confront the witnesses against him under the U.S. and Michigan Constitutions. *See* U.S. Const. amend. IV, Mich Const 1963, art 1, § 20; MCL 763.1.

The trial court, though crediting expert testimony indicating that this was junk science, failed to find plain error or ineffective assistance of trial counsel for failing to properly object to this testimony. On appeal, the Court of Appeals did not even mention this Court's language in *Young, supra*. Rather it found no plain error in refusing to exclude the test as junk science,

because “there are no published decisions in Michigan precluding such testimony, and ... courts from other jurisdictions have reached different results” (App. A at 7). Other unpublished Court of Appeals decisions recognize these preliminary gunshot residue tests are being excluded in Michigan courts as junk science. As a result, there is a conflict in the Michigan courts and some tension between the lower court’s decision in this case and this Court’s language in *Young*. This Court should grant Mr. Randolph’s application to correct the Court of Appeals error and clarify that (a) these dermal nitrate tests are not admissible in Michigan courts and (b) attorneys who fail to challenge them provide deficient performance. *See* MCR 7.305(B)(5)(b).

This Court should also grant Mr. Randolph’s application to redress the Court of Appeals’s clearly erroneous conclusion that it was part of trial counsel’s strategy to admit this inculpatory, seemingly-scientific evidence – a conclusion that is belied by the record. Trial counsel initially objected to the evidence and had his objections sustained but then failed to continue to object and let in this highly prejudicial, seemingly scientific evidence.

The Court of Appeals’s conclusion that there was no prejudice from the admission of the test results is predicated on a distortion of the prejudice analysis required by *Strickland v. Washington*, 466 US 668 (1984). Rather than determine whether there was a reasonable probability that, absent this highly-inflammatory hearsay evidence, the result of the proceeding would have been different (as *Strickland* requires), the Court of Appeals embarked on an improper and highly speculative explication of what the prosecutor and defense counsel *could have* done but *did not* actually do. The Court of Appeals suggested that the prosecution would have gotten the preliminary gunshot residue testimony entered into evidence through another witness (even though there was no reason to believe it had some other witness to testify to the test results) and then suggested that the defense attorney would then have countered that witness with expert testimony (even though trial counsel admitted that he had never even spoken to an expert for this case). After this fanciful explication of what could have happened, the court concluded with the statement that the evidence would therefore have been suggestive rather than

conclusive and was not prejudicial as a result. This complete distortion of the *Strickland* prejudice inquiry is manifestly unjust and requires reversal.

In addition to the preliminary gunshot residue test, the other evidence that the prosecution offered to suggest Mr. Randolph was the shooter consisted of threats to kill that he allegedly made to family members of the victim that day, evidence that he had ammunition (which did not match the murder weapon) in his belongings on the night of the shooting, and evidence that the murder weapon was discovered at his brother's apartment two months later while he was present there. None of this evidence was admissible. The Court of Appeals itself recognized that there were a lot of errors in this case, but ultimately affirmed Mr. Randolph's conviction. In so doing, it allowed a fundamentally unfair trial to result in Mr. Randolph's lifetime imprisonment.

First, multiple witnesses testified to impermissible and highly prejudicial hearsay reports regarding threats that Mr. Randolph allegedly made on the day of the shooting. In this circumstantial case, the prosecutor argued that Mr. Randolph had to be the shooter because he had been calling and threatening to kill members of the victim's family all day long. To substantiate this claim, the prosecution presented the testimony of two different witnesses, both of whom were asked to testify about *what others told* them Mr. Randolph had said that day. Most of this hearsay was improperly admitted without objection.

Trial counsel did object to a police officer's attempt to testify that the victim's twelve-year-old grandson had told her that Mr. Randolph had threatened to kill him and his mother that day. However, the trial judge impermissibly admitted the evidence. The Court of Appeals recognized the trial court's error, but erroneously determined that the threat to kill was harmless in this circumstantial murder case. In analyzing the possible prejudice that flowed from the erroneous admission of this hearsay testimony, the Court of Appeals improperly applied this Court's standard for determining prejudice under *People v Lukity*, 460 Mich 484, 495-96 (1999), because it did not consider what weight the erroneous admission of this statement had in light of

the “untainted” evidence. Rather, it considered other erroneously admitted evidence to determine that the error was harmless.

Second, Mr. Randolph’s constitutional right to be free from unreasonable searches and seizures was violated when the police went to his father’s house and asked his father for consent to search Mr. Randolph’s belongings even though his father did not have actual or apparent authority to consent to the search. As a result of that search, the police discovered ammunition, which ultimately led them to arrest Mr. Randolph at his brother’s apartment and search the apartment where they found the murder weapon. Trial counsel never even considered filing a motion to suppress this evidence. Although recognizing that Mr. Randolph’s father could not legitimately consent to the search at issue, the Court of Appeals erroneously held that Mr. Randolph had abandoned his belongings and thus had no expectation of privacy in them. The record demonstrated that Mr. Randolph took a number of steps to protect his expectation of privacy in his luggage – from packing his belongings in bags, telling his co-tenant that he specifically had an interest in those belongings, leaving the home without his belongings only after a weapon had been drawn on him, attempting to call his co-tenant repeatedly over the course of the day, and then retrieving his belongings at the first opportunity after his release.

Third, Mr. Randolph’s fundamental right to a fair trial was violated when evidence about ammunition found at his father’s house on the night of the shooting and evidence about a federal arrest warrant that had been issued for his arrest were admitted even though the prosecution had given no advance notice of its intention to admit this “other acts” evidence; the evidence had no relevance to the charge at issue; and it could only be considered by the jury to establish his propensity to violate the law and possess weapons.

The Court of Appeals permitted Mr. Randolph’s conviction to stand despite so much error because of an important and recurring legal error that the Court of Appeals has been making in cases involving allegations of plain error and ineffective assistance of trial counsel. Due to the ineffectiveness of Mr. Randolph’s trial attorney, many of the above-described errors

were unpreserved. Mr. Randolph timely moved for a *People v Ginther*, 390 Mich 436 (1973), hearing under MCR 7.211(C) and expanded the record to raise his ineffective-assistance claims. As a result, his appeal before the Court of Appeals involved allegations of plain error and ineffective assistance of trial counsel. The Court of Appeals improperly conflated the two inquiries, repeatedly stating that Mr. Randolph could not demonstrate ineffective assistance of trial counsel simply because he could not show plain error.

The conflation of the plain error and *Strickland* standards was pervasive throughout the Court of Appeals opinion in this case and is indicative of a more general confusion in the lower appellate court about the relationship between plain error and *Strickland* ineffective-assistance-of-counsel claims. First, the Court of Appeals appears to believe that if an error is not “clear or obvious” on the face of the record for plain error purposes, then there is automatically no deficient performance under *Strickland*. This is not true in many cases where the reason the error is not obvious is because defense counsel failed to investigate, discover it, and adequately present it to the trial court. Second, the Court of Appeals appears regularly to conflate the prejudice inquiries in the plain error and *Strickland* standards. This latter error, which is oft-repeated in unpublished Court of Appeals’s decisions, directly contradicts language from this Court that the plain error prejudice standard is higher than the *Strickland* prejudice standard, *People v Fackelman*, 489 Mich 515, 537 n 16 (2011), and is yet another reason to grant Mr. Randolph’s application. See MCR 7.305(B)(5)(b).

Other state courts have experienced confusion similar to that of the Michigan Court of Appeals about the relationship between plain error and *Strickland* prejudice. See, e.g., Kristin Traicoff, *Closing Two Doors: How Courts Misunderstand Prejudice Under Olano and Strickland*, 21-WTR Crim Just 24 (2007). The highest courts in other states have taken cases to definitely resolve the conflict and explain that the plain error standard is higher than the *Strickland* standard. See, e.g., *Ex parte Taylor*, 10 So 3d 1075 (Ala 2005); *Deck v State*, 68 SW

3d 418 (Missouri 2002). This Court should grant this application for leave to appeal to resolve, once and for all for the lower appellate court, the relationship between these standards.

For all of the above reasons, alone and collectively, Mr. Randolph respectfully requests this Court grant leave to appeal to address these issues or peremptorily reverse his convictions and remand for a new trial.

## **BACKGROUND**

Andrew Maurice Randolph seeks leave to appeal the Court of Appeals's November 24, 2015 decision affirming his convictions for second-degree murder, intentional discharge of a firearm at a dwelling, possession of a firearm by a person convicted of a felony, and felony firearm after a three-day jury trial before Genesee County Circuit Court Judge Geoffrey Neithercut on March 4-6, 2014.

Around 6:30 p.m. on December 10, 2012, police went to 617 Flint Park in Flint to respond to a call about a shooting. (T2, 65; T3, 4).<sup>1</sup> Vena Fant lay dead on the living room floor having been killed by a gunshot wound to the neck. (T2, 68; T4, 31).<sup>2</sup> Vena had lived with her fiancé, and his sister, Linda Wilkerson. (T2, 5). At the time of the shooting, Wilkerson was at the house along with Vena's twelve-year-old grandson, Devon Clayburn. (T1, 194; T2, 13). Both Wilkerson and Clayburn testified that they were in the back of the house when they heard gunshots. (T1, 194; T2, 11) They both fell to the ground and were uninjured. Neither of them saw the shooter or knew if there was more than one shooter. (T1, 201; T2, 22).

According to Trooper Craig Carberry, one of the first officers to arrive on the scene, there were three to five fresh bullet holes across the front of the house. (T2, 70-71). Police recovered fire cartridge cases in the road (T2, 88-92), as well as a fired bullet that had passed through an interior wall and lodged itself in some clothing in a front closet (T2, 98-99). The medical

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<sup>1</sup> All transcript references will be as follows: "T1" refers to Volume I of the trial transcript dated March 4, 2014. "T2" refers to morning testimony in Volume 2 of the trial transcript dated March 5, 2014. "T3" refers to the afternoon testimony in Volume 2 of the trial transcript dated March 5, 2014. "T4" refers to Volume III of the trial transcript dated March 6, 2014. "S" refers to the sentencing transcript dated March 31, 2014. "H1" refers to the transcript of the evidentiary hearing after remand dated May 11, 2015. "H2" refers to the transcript of the evidentiary hearing after remand dated May 18, 2015.

<sup>2</sup> Vena Fant's daughter, Kanisha Fant, testified at trial. For clarity, we will refer to Vena Fant as "Vena" and Kanisha Fant as "Kanisha." We mean no disrespect to the victim or her daughter in using their first names.

examiner also recovered the bullet that had struck Vena in the neck, causing her death. (T4, 27-30). Both bullets, as well as the fire cartridge cases, came from a 9 millimeter handgun. (T4, 76).

At the time of the shooting, Andrew Randolph was the boyfriend of Vena's daughter, Kanisha. (T1, 152). Kanisha and Mr. Randolph had been dating for a little over a year and were living together in a house on Seneca Street in Flint that they shared with Kanisha's four children. (T1, 152). Kanisha described their relationship as "tumultuous." (T1, 152). They both drank excessively and frequently fought, sometimes physically and violently. (T1, 152, 167, 187) A month before the shooting, Kanisha had obtained a personal protection order, but she and Mr. Randolph had later reconciled. (T1, 173-74). When Mr. Randolph and Kanisha fought, Vena would sometimes act as peacemaker. (T1, 176). According to Kanisha, Vena did not approve of Mr. Randolph's drinking but she did not have anything against him personally. (T1, 177-78).

Mr. Randolph and Kanisha had been fighting the night of December 9, 2012 and into the morning on December 10. (T1, 154-162). According to Kanisha, at some point, Mr. Randolph hit her across her face with an open hand. (T1, 164, 166). Kanisha then went to the kitchen and got a knife (T1, 167). They fought over the knife. (T1, 168). During the struggle, Kanisha testified that Mr. Randolph head-butted her, held her in a chokehold, and told her just to drop the knife and he would leave. (T1, 170). Kanisha's son also heard Mr. Randolph tell her to calm down. (T1, 189). Kanisha dropped the knife and Mr. Randolph grabbed it and left. (T1, 170).

After Vena's death, police focused on Mr. Randolph as a suspect. They detained him the night of the murder, but they let him go because they did not believe that they had enough to hold him (T1, 140). Six months later, prosecutors charged Mr. Randolph with murder and related weapons offenses. The case against Mr. Randolph was entirely circumstantial. There were no eyewitnesses or confessions. Rather, the State's case consisted of four primary pieces of evidence in addition to testimony about the fight between Kanisha and Mr. Randolph on the morning of December 10: (1) testimony about threats that Mr. Randolph had allegedly made to Kanisha's family on December 10; (2) testimony that one of Mr. Randolph's hands tested

positive for gunpowder residue when it was analyzed on the night of the murder; (3) testimony that ammunition was found in Mr. Randolph's possessions on the night of the murder; and (4) testimony from Sgt. Andrew Cariveau, an expert in firearms identification, that a 9 millimeter handgun found at Mr. Randolph's brother's house, two months after the homicide, was the handgun that fired the bullets and left the fire cartridge cases at the crime scene. The defense did not contest that a homicide took place, but argued that Mr. Randolph did not commit the crime.

***The Threats.*** In his opening statement, the prosecutor explained his theory of the case, arguing that, after Kanisha and Mr. Randolph's morning argument, "that whole day he stewed, and stewed, and got angry, and started calling and threatening people." (T1, 136). At trial, the State presented evidence regarding four alleged threats that Mr. Randolph made that day. First, Wilkerson, the sister of Vena's fiancé, testified that shortly before the shots were fired at the house, Vena told her that Mr. Randolph had "been calling all day threaten' to kill the family, especially Lo<sup>[3]</sup> and Vontay<sup>[4]</sup>" (T2, 7). Wilkerson went on to testify that Vena "said she wanted me to call my son and tell him what he had said, what was going on, that he was saying that he was going to kill the family, so they wanted – she wanted my son to be aware of this – that he might cause some trouble with him." (T2, 8). The prosecutor asked, "How was it that Vena said it?" and Wilkerson responded: "She said, she's like, well, we better watch out. He said he's goin' get us, we better be on the alert. It was more or less like that type of – we better, we better watch out 'cause he said he's goin' get us, he's goin' kill us, he's goin' kill us." (T2, 9). Wilkerson testified that, after thinking about it, she came back and said, "Vena, I said do you really think I should call Lo and tell him that? She turned around in my face and said I would. You know, she was like, you better. Or, in that kind of tone that told me, yeah, you better call your son and tell him this man is after him." (T2, 10). Trial counsel did not object.

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<sup>3</sup> "Lo" was a nickname for Linda Wilkerson's son (T2, 8).

<sup>4</sup> "Vontay" was a nickname for Vena Fant's nephew (T2, 8).

Vena's fiancé, Miller, testified that he got an "angry" call from Mr. Randolph that day. (T2, 40). According to Miller, "[Randolph] was going off about the fight that him and Kanisha had, he said he felt, he was threatening and he was goin' do somethin' about it (sic)." (T2, 40).

Detective Sgt. Valencia Jones then testified that when she arrived on the scene at 6:45 p.m. on December 10, she interviewed Kanisha's son, Devon Clayburn, about the earlier fight between Kanisha and Mr. Randolph. Over defense objection, Jones testified that Clayburn had told her "that the defendant had threatened him and his mother that he would kill them earlier, during an earlier altercation that day." (T3, 8). Clayburn had testified the day before that Mr. Randolph did not threaten him or anyone else. (T1, 190). No limiting instructions were given.

Jones then testified, without any objection, that "[t]he family had stated that the defendant had left several threatening messages on their answering machine." (T3, 13). Only one voice mail message was retrieved from the machine. (T3, 13-14). That message was played for the jury, but it did not contain any audible threats. Kanisha, who heard that message, described it as follows, "[h]e was trying to flip the situation. Like yelling and screaming to ask me why he woke up with a knife to his neck. He said 'I'm tired of y'all family. Everybody always messing with me. Um, just things of that nature, Just yelling – a lot of it I couldn't really make out, cause he was yelling and screaming so loud.'" (T1, 172).

***The Preliminary Gunshot Residue Test.*** Mr. Randolph was taken into custody on the night of the shooting, and Alona Smallwood, a technician, did a preliminary gunshot residue test on his hands. (T3, 8-9). Smallwood, however, did not testify. Rather, the prosecution presented surrogate testimony – that of Det. Sgt. Jones and Sergeant Bradley Ross – to explain the results of this scientific test. Both Jones and Ross testified that they were present when the test was performed. (T3, 8-9, 23). Both admitted that it was a preliminary test, that this was the first time they had seen the test performed, that neither had been trained in how to perform the test, or had ever done it themselves, and that they had never read the test instructions. (T3, 10, 16, 24-26). Jones testified that if the test turned blue, there was a positive reaction. (T3, 9). Defense counsel

objected, citing Jones's lack of expertise, but never moved to strike the testimony. (T3, 9). Jones testified, without any objection, that there was a positive reaction on Mr. Randolph's right hand. (T3, 10). Ross testified that Smallwood told him that there was a reaction. (T3, 23). Defense counsel objected and it was sustained, but counsel never moved to strike the testimony. (T3, 23-24). Ross then testified, without objection, that he saw the test solution turn blue. (T3, 24).

***The Ammunition and Ballistics Testimony.*** During the argument that Mr. Randolph had with Kanisha on December 9-10, Mr. Randolph packed his clothes and belongings to leave the house. (T1, 165; T2, 38-39). Miller and Vena delivered Mr. Randolph's packed belongings to Mr. Randolph's father's house later on December 10. (T2, 39). Upon learning this fact, Jones went to Mr. Randolph's father's house, intending to search Mr. Randolph's belongings. (T3, 11). She did not have a warrant; nor did she have Mr. Randolph's consent. Instead, she asked for and obtained consent from Mr. Randolph's father to search Mr. Randolph's belongings. (T3, 11).

At trial, Jones testified that the police found eight rounds of .357 ammunition in Mr. Randolph's belongings and another 28 rounds of .38 ammunition in another room. (T3, 12-13). The bullet that killed Vena was fired from a 9 millimeter handgun. (T4, 76). No pre-trial notice was given to the defense of the State's intention to present evidence that Mr. Randolph possessed this ammunition. No objection was made to the testimony, and no motion to suppress was filed.

When the State failed to amass enough evidence to prove that Mr. Randolph committed this crime, it asked federal agents for assistance. (T4, 38, 44-45). Sergeant Devon Bernritter, from the Bureau of Alcohol, Tobacco, and Firearms gun task force, reviewed the file. Knowing that Mr. Randolph had a prior felony conviction, Bernritter used the fact that ammunition was found in Mr. Randolph's possessions to obtain a federal arrest warrant charging Mr. Randolph with the federal crime of being a felon in possession of ammunition. (T4, 39-40). The jury heard about this federal warrant without any defense objection, and the State did not provide any pre-trial notice of its intention to introduce evidence of this other offense.

On February 10, 2013, Bernritter got a tip that Mr. Randolph was staying at his brother's apartment (T4, 42). While executing the arrest warrant, he found out that Mr. Randolph's brother was on parole (T4, 48). Relying on the parole condition, police searched the apartment and found the handgun that was later linked to the homicide, another "long gun," and an extra magazine for the handgun in a second-floor bedroom identified as Mr. Randolph's brother's (T4, 43-44, 48). Some of Mr. Randolph's belongings were found in the basement (T4, 46, 49).

Sgt. Andrew Carriveau, a firearms expert, testified that he performed a number of tests on the handgun found at Mr. Randolph's brother's house and, in his expert opinion, that handgun fired the bullets and left the fire cartridge cases at the crime scene. (T4, 64-66).

***The Verdict, Sentence, Appeal, and Remand.*** The jury returned verdicts finding Mr. Randolph guilty of second-degree murder, intentional discharge of a firearm at a dwelling, possession of a firearm by a person convicted of a felony, and felony firearm, but not guilty of first-degree murder (T4, 146). Mr. Randolph was sentenced to paroleable life on the second-degree murder count, 45-72 months concurrent on the intentional discharge count, 60-90 months concurrent on the felon in possession count, and 2 years consecutive on the felony firearm (S. 27). Mr. Randolph appealed of right alleging, *inter alia*, four grounds of ineffective assistance of trial counsel. On March 26, 2015, the Court of Appeals remanded this case to the trial court for an evidentiary hearing on the ineffective-assistance-of-trial-counsel claims raised in Mr. Randolph's Motion for Remand. *See* 3/26/15 Order (attached as App. C). At the evidentiary hearing, Mr. Randolph offered the testimony of three witnesses: David Balash, an expert in the analysis of gunpowder patterns and gunpowder residue; Alphonso Taylor, Mr. Randolph's father; and David Clark, Mr. Randolph's trial attorney. The State presented no evidence.

***Ginther Hearing Testimony Regarding Preliminary Gunshot Residue Test.*** David Balash, an expert in the analysis of gunpowder patterns and gunpowder residue,<sup>5</sup> testified that

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<sup>5</sup> At the evidentiary hearing, the State stipulated to Mr. Balash's expertise in these areas and the Court found him to be an expert (H1, 12).

the Blue View Gun Residue Kit test (hereinafter “Blue View test”) that the police used to examine Mr. Randolph’s hands on the night of the shooting is “junk science” when used to suggest that a person has gunpowder on his hands (H1, 20). A person whose hands have been in contact with fertilizers, matches, cured bacon, staples, urine, or tobacco could show a positive reaction on this test (H1, 13-14). As Balash explained, the Blue View test is simply a dermal nitrate test that detects the presence of nitrates (H1, 13). It does not tell you if a person has gunpowder residue on his skin (H1, 14). Balash testified that the test is inherently unreliable (H1, 15, 16, 17); not used by reputable labs (H1, 15); and is not a generally accepted scientific test for determining the presence of gunpowder residue (H1, 18). Balash testified that he did not know of *any* publications or peer-reviewed studies suggesting that dermal nitrate tests, like the Blue View test, are valid scientific tests for determining the presence of gunpowder (H1, 15, 17). In fact, Balash explained, the Association of Firearms and Toolmark Examiners, a national peer-reviewed group, publishes a manual for people in the profession of firearms identification and, according to that manual, dermal nitrate tests are “outdated,” “obsolete,” and “unreliable” (H1, 16-17). Additionally, the Firearms Investigation Identification and Evidence treatise contains peer-reviewed studies demonstrating the unreliability of dermal nitrate tests (H1, 17). Balash explained that the science behind the Blue View test is the same as that behind the old paraffin wax test (H1, 19). Both are dermal nitrate tests (H1, 19). The paraffin wax test was discontinued years ago because it was known to be unreliable (H1, 15). At the conclusion of Balash’s testimony, the trial judge turned to Balash and said, “all those TV cop shows talk about gun powder residue” (H1, 21). The judge then emphasized that “5 times a year in the cases I try ... the jury will send a question up to the police saying did you do a gunpowder residue test” (H1, 22).

Mr. Randolph’s trial attorney testified that he received discovery from the State indicating that a Blue View test was performed on Mr. Randolph’s hands on the night of the shooting (H1, 48). Trial counsel then admitted that he did not do any research into the science behind Blue View test (H1, 48); he never consulted a firearms expert about this preliminary

gunshot residue test to determine if it was scientifically valid (H1, 53); he never considered filing a motion in limine to exclude the test (H1, 53); he was unaware that Michigan courts had excluded testimony about the results of preliminary gunshot residue tests due to their scientific unreliability (H1, 50-51); he was unaware that the Michigan State Police and other law enforcement agencies had stopped using the tests because of their unreliability (H1, 51); and, although he knew that the Blue View test detected the presence of nitrates, he did not know that the Michigan Supreme Court as well as the courts of other states had recognized the unreliability of nitrate-based gunpowder residue tests (H1, 51-52). When asked whether he considered consulting an expert to determine if this preliminary gunshot residue test was junk science, he responded “[i]t’s a preliminary test. All preliminary tests are junk science. But they’re admissible in a lot of places because it doesn’t go to admissibility, it goes to weight” (H1, 70).

Trial counsel twice stated that “it’s up to the jury to put weight on it” (H1, 69, 70). Trial counsel also attempted to offer a strategic reason for allowing this preliminary test. Trial counsel testified that when he first went to the jail to see his client and mentioned the preliminary test results, Mr. Randolph said that he wanted to discredit the test by telling the jury that the police let him go that night after conducting the test (H1, 49). In trial counsel’s words, Mr. Randolph “pushed me into it” (H1, 69). Trial counsel admitted that he never explained to Mr. Randolph that there might be an alternative – that they might be able to exclude the test altogether (H1, 49). He never even investigated it (H1, 48). When trial counsel was asked if he ever considered advising his client about alternative ways of approaching this scientific test, counsel testified that he did not want to get into a battle of experts before the jury (H1, 69). He later admitted that moving in limine to exclude the test would not have involved the jury (H1, 70).

Trial counsel admitted that it was not his strategy to permit evidence of this preliminary gunpowder residue test to come in through Jones (H1, 54). Trial counsel objected when Jones began to testify about the results of the Blue View test that was performed on Mr. Randolph’s hands the night of the shooting (T3, 9). Trial counsel admitted that he was trying to prevent her

from testifying to the results or meaning of the preliminary gunpowder residue test, because she was an unqualified lay person (H1, 54). Counsel also admitted that he was trying to get Ross's testimony about the preliminary gunshot residue test excluded (H1, 59-60). Both of these objections were sustained, but the prosecutor then proceeded to ask for essentially the same information in a different way, and defense counsel did not object (T3, 9-10, 23-24).

When asked why he did not continue to object, trial counsel testified that he did not object when Ross testified that he observed a blue color in the test packet, because he had already been disqualified as an expert in anything (H1, 62). The judge asked him to clarify and trial counsel explained that "he had already admitted he didn't know what the test meant or what it did. And you'd already sustained that he wasn't an expert in any of it. So he could have told them that the thing turned pink or blue or came up looking like Santa Claus. He – as far as the jury knew, they knew that Trooper Ross didn't know what he was talking about. He was totally discredited as to – as to the test. And then in a few moments later if you go through the testimony he testifies that they released Mr. Randolph. They – even they knew the test didn't tell 'em anything, so they sent him home." (H1, 63). However, in response to further questioning, defense counsel admitted that no testimony had been elicited from Ross at that point about his qualifications to interpret the test (H1, 64). Nor were any questions asked on direct or cross examination of either Ross or Jones about Mr. Randolph's release from custody that night. Defense counsel also admitted that if he "had spent 4 or 5 or 6 hours [he] might have been able to find something" in terms of case law or statutes that would have kept out the observational testimony of Jones and Ross in relation to the color change on the preliminary gunshot residue test (H2, 42). But he did not do that research (H2, 42).

Trial counsel admitted there were no strategic reasons why he failed to raise a Confrontation Clause objection to this testimony. Trial counsel testified that he knew that Alona Smallwood was the technician who had performed the test (H1, 64) and he knew from the prosecution's opening statement that the prosecutor was intending to present the results of this

scientific test through the testimony of a surrogate, Jones (H1, 64-65). When trial counsel was asked why he did not raise a Confrontation Clause objection to this surrogate testimony, he offered no strategic reason; rather, he candidly admitted that he “missed that.” (H1, 65).

***Ginther Hearing Testimony about the Ammunition Found at Mr. Randolph’s Father’s House and the Guns Found at Mr. Randolph’s Brother’s House.*** Mr. Randolph’s father, Alphonso Taylor, testified that on the morning of December 10, 2012, Vena and Miller came to his home to deliver Mr. Randolph’s clothing and belongings (H1, 28). Mr. Randolph was not living with Taylor at the time and had, in fact, never lived at that address (H1, 33). Mr. Randolph’s clothing was packed in a duffel bag and plastic bags (H1, 28). According to Taylor, Mr. Randolph’s belongings were placed in the living room of his home and he was told to give them to Mr. Randolph (H1, 29). Taylor testified that (a) he never touched Mr. Randolph’s belongings; (b) Mr. Randolph never gave him permission to go through the belongings; and (c) he did not feel that Mr. Randolph would have wanted him to touch his belongings (H1, 30).

Taylor also testified that the police came to his home between 11:00 pm and 1:00 am that night (H1, 27-28). At that point, all of Mr. Randolph’s belongings were still in the bags in which they had been delivered (H1, 34). After determining that Taylor was Mr. Randolph’s father, the police asked Taylor who the duffel bag and plastic bags belonged to and he informed them that they were Andrew Randolph’s belongings (H1, 30-31). The police never asked Taylor if he had permission to go through Mr. Randolph’s belongings (H1, 31, 33). The police never presented Taylor with a search warrant of any kind (H1, 30). When police asked Taylor if he had touched Mr. Randolph’s belongings, he told them that he had not. (H1, 31). They never asked Taylor if he had the authority to consent to a search of Mr. Randolph’s belongings (H1, 31). Instead, the police asked Taylor for consent to search Mr. Randolph’s belongings (H1, 30). Taylor testified that Mr. Randolph came to collect his belongings as soon as he was released from jail (H1, 32).

Mr. Randolph’s trial attorney admitted that there was no strategic reason that he had for not filing a motion to suppress the guns and the ammunition. Rather, he testified that he believed

that Mr. Randolph had no standing to file a motion to suppress the ammunition found at Taylor's house (H1, 46). Similarly, trial counsel testified that he did not believe that Mr. Randolph had standing to file a motion to suppress the guns and ammunition found at his brother's home, because his brother was a parolee (H1, 45). In fact, trial counsel admitted he did no legal research to determine if there were suppression issues with respect to the weapons and ammunition (H1, 45). He also admitted that if he knew of credible law that might have supported a motion to suppress the guns or the ammunition, he would have filed it (H1, 45).

**Ginther Hearing Testimony Regarding Hearsay Evidence.** Trial counsel admitted that it would have been better for Mr. Randolph's case if no testimony had been admitted about threats that Mr. Randolph had allegedly made to the victim or her family on the day of the shooting (H2, 5). With respect to Vena's alleged statements to Wilkerson, trial counsel admitted that "I would have stopped it if I could" (H2, 48). Trial counsel further explained his view that "[t]here was no way I was gonna keep every single threat out of there, because he threatened everyone in that house at one time or another." (H1, 73). Because counsel did not think he could keep the threats out, he decided to describe his own client to the jury as a "jerk," an "ass," and an "insufferable" person who threatened people but never killed anyone (T4, 100-109; H1, 72; H2, 14-15).

**Ginther Hearing Testimony Regarding Character Evidence.** Defense counsel testified that the prosecution never gave him notice that it intended to present 404(b) evidence with respect to the ammunition that was found at Taylor's house or with respect to the federal arrest warrant that was issued for Mr. Randolph for being a felon in possession of ammunition (H2, 9-10). Defense counsel also recognized that jurors would likely assume that Mr. Randolph possessed weapons because ammunition was found in his possession (H2, 11-12). However, defense counsel did not object to the character testimony about the ammunition that was found in Mr. Randolph's belongings. Trial counsel explained that he did not object to it, because Mr. Randolph wanted it to be admitted into evidence to "attack the police" (H1, 44).

***Trial Court's Ruling and Appeal.*** On June 12, 2015, the trial judge issued an order noting that “the defense raises persuasive arguments,” but ultimately denying Mr. Randolph’s Motion for a New Trial with a general assertion that trial counsel’s decisions were strategic; the objections would have been futile; and there was no prejudice in any event. *See* 6/12/15 Order (attached as App. D). Following supplemental briefing and argument, the Court of Appeals affirmed Mr. Randolph’s convictions (App. A). Mr. Randolph’s timely-filed motion for reconsideration was denied on January 14, 2016 (App. B). Mr. Randolph now seeks leave to appeal in this Court.

## **ARGUMENT**

- I. MR. RANDOLPH WAS DENIED A FAIR TRIAL AND HIS RIGHT TO CONFRONT THE WITNESSES AGAINST HIM WAS VIOLATED WHEN TWO POLICE OFFICERS TESTIFIED ABOUT THE POSITIVE RESULTS OF A PRELIMINARY GUNSHOT RESIDUE TEST THAT WAS PERFORMED ON MR. RANDOLPH’S HANDS THE NIGHT OF THE SHOOTING EVEN THOUGH NEITHER OF THE TESTIFYING OFFICERS PERFORMED THE TEST, NEITHER WAS A QUALIFIED EXPERT IN PERFORMING OR EVEN KNEW HOW TO PERFORM THE TEST, AND THE TEST ITSELF RELIED ON JUNK SCIENCE THAT IS NOT GENERALLY ACCEPTED IN THE SCIENTIFIC COMMUNITY BECAUSE IT IS SO UNRELIABLE. TRIAL COUNSEL WAS CONSTITUTIONALLY INEFFECTIVE FOR FAILING TO OBJECT TO AND OTHERWISE CHALLENGE THIS TESTIMONY.

### **STANDARD OF REVIEW**

Constitutional questions are reviewed de novo and any associated findings of fact are reviewed for clear error. *People v LeBlanc*, 465 Mich 575, 579 (2002). Unpreserved errors are reviewed for plain error. *See People v Carines*, 460 Mich 750 (1999).

### **FACTUAL BACKGROUND**

Detective Sgt. Valencia Jones testified that Mr. Randolph had been taken into custody on December 10, 2012 and was at the police department when she arrived. (T3, 8). Around 10:00

p.m. that night, Jones observed a gunshot residue test administered to Mr. Randolph's hands. Although she had never administered the test and was not trained in how it is performed, Jones testified to how she "understood" the test worked, including that a solution that was swabbed onto a suspect's hands would turn blue if "there was gunpowder" (T3, 7-11, 17-18). Despite a preliminary objection to the lack of foundation for Jones's testimony and to the fact she lacked the expertise on the gunshot residue test, trial counsel did not object when follow up questions were asked that elicited Jones's testimony describing what she observed when the test was administered to Mr. Randolph's hands and what it meant. *Id.*

Sergeant Bradley Ross then testified for the prosecution for the sole purpose of discussing the same preliminary gunshot residue test (T3, 23-24). When Ross attempted to explain the he was advised by the evidence technician that there was a reaction to the test, the defense objection on hearsay grounds was sustained. *Id.* However, without objection, Ross then testified that he "did observe a blue color in the test packet" when the prosecutor asked, if he was "aware of any reaction or result to that test." *Id.* On cross-examination, Ross admitted that he had never been trained in how to conduct the test, had never performed one of these tests himself, and had never even seen one done prior to that day (T3, 24). He did not look at the test package or read the instructions himself. (T3, 25).

#### **ARGUMENT**

Jones and Ross's testimony about the results of a preliminary gunshot residue test performed on Mr. Randolph's hands was inadmissible for at least five different reasons: (1) the test is based on unreliable junk science, and therefore inadmissible under MRE 702; (2) these officers lacked sufficient qualifications to offer expert opinion testimony about what a positive reaction was or what it meant, and their opinions should have been excluded under MRE 701 and 702; (3) any knowledge that these officers did have about the test results was based on speculation and hearsay and should have been excluded under MRE 602 and 802; (4) admission of the test results through a surrogate who did not perform the test violated Mr. Randolph's

federal and state constitutional rights to confront the witnesses and (5) the test result was irrelevant without a qualified expert to interpret it; it should have been excluded under MRE 401 and 402; and any minimal probative value the test might have had was substantially outweighed by the danger of unfair prejudice such that it should have been excluded under MRE 403. The Court of Appeals recognized that “Jones’s testimony regarding the test result was inadmissible on hearsay grounds, as was Ross’s testimony,” but ultimately held that counsel’s incomplete attempts to challenge this evidence did not constitute ineffective assistance of counsel and that the error itself did not constitute plain error. Both of these determinations were erroneous.

***The preliminary gunshot residue test was inadmissible.***

Although the Court of Appeals recognized that the preliminary gunshot residue test results were inadmissible on hearsay grounds (App. A at 7), it erroneously rejected other grounds for excluding this evidence, all of which contribute to the plain error and ineffective assistance claims. As a result, we will explain the reasons why this testimony was patently and obviously inadmissible and should have been objected to by trial counsel and/or excluded by the trial judge.

Ground #1: The preliminary gunshot residue test is unreliable junk science that should have been excluded under MRE 702.

Under MRE 702, “scientific, technical, or other specialized knowledge [that] will assist the trier of fact to understand the evidence or to determine a fact in issue” is admissible only if it is “the product of reliable principles and methods” and “the witness has applied the principles and methods reliably to the facts of the case.” This Court has interpreted the rule to require exclusion of “junk science” and to ensure that all scientific testimony be based in “reliable principles and methodology.” *Gilbert v DaimlerChrysler Corp.*, 470 Mich 749, 782 (2004). Rule 702 incorporates the *Daubert v Merrell Dow Pharmaceuticals, Inc.*, 509 US 579 (1993), factors for determining when a scientific test is so unreliable as to be deemed inadmissible. These factors include whether the technique has been tested, whether it has been subjected to peer review and publication, the known or potential rate of error, the existence and maintenance of

standards controlling the technique's operation, and the general acceptance of the test in the relevant scientific community. *Daubert*, 509 US at 593-95; *Gilbert*, 470 Mich at 782.

The Blue View preliminary gunshot residue test is unreliable junk science when used to suggest the presence of gunpowder. David Balash, a firearms examiner and forensic science consultant, testified that, to perform this test, the police use an adhesive material to pat the suspect's skin and/or clothing and then place the adhesive material into a bag with an ampule containing a chemical solution in order to test for the presence of nitrates (H1, 13, 19). This test, Balash explained, does not detect anything other than the presence of nitrates on skin and/or clothing (H1, 13-14). Nitrates, however, are readily available in the environment and are easily transferred to peoples' hands. For example, a person whose hands have come in contact with fertilizer, urine, various detergents, cured bacon, and even the adhesive on staples could easily have nitrates on his hand and yield a "positive" test. (H1, 13-14). Thus, the test results are worthless in determining whether a person has recently fired a gun, and reputable forensic laboratories would never rely on a preliminary test like this. (H1, 14-15). *See People v Jones*, 2014 WL 3612697, at \*6 (Mich Ct. App. 2014), attached as App. E (quoting a state prosecutor as saying "that a gunshot residue test was no longer used by the Michigan State Police or other law enforcement agencies 'because it's not a reliable test'").

According to Balash, the Blue View test is not a generally accepted scientific test for determining the presence of gunpowder (H1, 18). Rather, using a Blue View test to show the presence of gunpowder is "junk science" (H1, 20). *See also People v Daniel*, 2014 WL 3844010, at \*17 (Mich Ct. App. 2014), attached as App. F (describing the testimony of another firearms expert who described gunshot residue as "fragile" evidence and denied that gunshot residue tests necessarily were reliable). There is "simply too great an analytical gap between the data [the positive test result for the presence of nitrates] and the opinion proffered [that the person has gunpowder on his hands]." *General Electric Co. v Joiner*, 522 US 136, 146 (1997). The Blue View test is a reincarnation of the old dermal nitrate paraffin wax test (H1, 13). Laboratories

discontinued use of the paraffin test after it was deemed unreliable (H1, 15-16). The test was declared to be obsolete and “unreliable” by multiple, peer-reviewed studies (H1 16-17).

A rudimentary Westlaw search for “gunshot residue test” reveals that Michigan courts exclude preliminary gunshot residue tests as scientifically unreliable. *See, e.g., People v Sawyer*, 2011 WL 2518863, at \*4 (Mich Ct. App. 2011), attached as App. G (noting that the trial court granted a motion in limine to exclude testimony about the results of a preliminary gunshot residue test, because it “had no scientific reliability under MRE 702” and noting that, although the issue was abandoned on appeal, “[w]e, nevertheless, are unconvinced that preliminary gunshot residue tests are scientifically reliable”); *id.* at \*4 n.2 (noting that, in a different case, a trial court had similarly deemed preliminary gunshot residue evidence “inadmissible for failure to show scientific reliability”). Additionally, this Court has recognized the unreliability of gunshot residue tests based on nitrate association. *See People v Young*, 425 Mich 470 (1986). The trial court found Balash’s testimony about the unreliable nature of this seemingly-scientific test credible. (App. D at 1-2). The Court of Appeals did not dispute this factual finding.

Ground #2: These officers were offering expert opinion testimony, but they did not have the requisite training or experience to testify about what a positive reaction was or what it meant so their opinions should have been excluded under MRE 701 and 702.

Under MRE 701, non-experts may not offer expert testimony. *See Moore v Lederle Labs.*, 392 Mich 289, 295 (1974) (“If a witness is to give an opinion an untrained layman could not, the witness must first qualify himself.”). A non-expert witness’s testimony “is limited to those opinions or inferences which are ... rationally based on the perception of the witness....” MRE 701. A person offers expert testimony when she suggests that the jury draw conclusions from scientific, technical, or other specialized knowledge. *See Moore*, 392 Mich at 295. Neither Jones nor Ross was qualified as an expert. However, their testimony of a positive reaction to the preliminary gunshot residue test was not an opinion or inference “rationally based on [their] perception[s].” The fact that they saw the color blue might have been lay opinion testimony, but their testimony went far beyond that. Both witnesses testified that there was a “reaction” to the

test (T3, 7-11, 23-24). In opening statements, the prosecutor previewed that Jones would testify the test “came back positive.” (T1, 140). And in closing arguments, the prosecution emphasized that Jones and Ross had testified that the test “was positive” for gunshot residue. (T4, 86-87).

A positive reaction to a test for nitrates is not something to which a non-expert can testify. It involves assessing the chemical reaction between particles recovered from a suspect’s skin and an ampule containing a chemical solution to test for the presence of nitrates. It is based on scientific principles and tests for the presence of a chemical unidentifiable to the naked eye. Only someone with specialized knowledge could observe this test and understand what the different colors that might result actually mean. By their own admission, neither Jones nor Ross had that specialized knowledge (T3, 7-11, 16, 24-25). They never should have been permitted to give expert testimony that there was a positive reaction and that the reaction is an indication of “whether or not a person has gunpowder residue on their hands” (T3, 10). The Court of Appeals seemed to recognize that there might be a problem with a lay witness testifying that a chemical reaction indicates whether a person has gunpowder residue on the hands, but then stated that “it is not clear whether the inference that defendant had gunpowder residue on his hands was based on Jones’s personal knowledge and perceptions, or was based on hearsay” (App. A at 7). The record, however, is eminently clear that Jones had no personal knowledge about how this test was performed. She admitted that she had never seen the test performed before, had never given the test herself, had never been trained about gunshot residue tests, did not know if different shades of blue were possible on the test, and had never even read the directions for the test (T3, 7-18). In fact, Jones herself admitted that her knowledge was based on hearsay when she agreed that she was not familiar with how the test operated but “was told that it would turn blue” if there was gunpowder (T3, 17-18). The Court of Appeals’s suggestion that Jones might have had the requisite knowledge to testify to this expert information is belied by the record.

Ground #3: Any knowledge that these officers had about whether there was a positive reaction was based on speculation and hearsay and should have been excluded under MRE 602 and 802.

“A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.” MRE 602; *see also People v Allen*, 429 Mich 558, 567 (1988) (noting that a witness’s testimony may be “disallowed if he has no personal knowledge of the events about which he testifies”). Moreover, MRE 801 and 802 explain that “a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted,” is inadmissible hearsay unless an exception applies. Both Jones and Ross admitted that they had no personal knowledge of what caused a positive reaction to this test. (T3, 16-18, 24-25). Both admitted that their knowledge of a positive reaction came from out of court statements (T3, 18, 23). The witnesses’ conclusions about a positive test reaction should have been excluded under MRE 602 and 802 – a fact that the Court of Appeals correctly recognized (App. A at 7).

Ground #4: Admission of the test results through a surrogate who did not perform the test violated Mr. Randolph’s constitutional right to confront the witnesses against.

The Sixth Amendment to the United States Constitution’s Confrontation Clause proscribes the introduction of “testimonial evidence” absent confrontation. *Crawford v Washington*, 541 US 36, 68 (2004); *see also* Mich Const 1963, art 1, § 20; MCL 763.1. Lab reports detailing lab test results, particularly when the tests are performed to create evidence for a possible criminal prosecution, are testimonial and inadmissible absent an opportunity to confront and cross-examine the actual lab technician who conducted the testing. *Bullcoming v New Mexico*, 546 US \_\_\_\_; 131 S Ct 2705 (2011); *Melendez-Diaz v Massachusetts*, 557 US 305 (2009). “Surrogate testimony,” whether verbal or written, is not enough to satisfy the Confrontation Clause. *Bullcoming*, 131 S Ct at 2710; *People v Fackelman*, 489 Mich 515 (2011).

In *People v Fackelman*, this Court held that it was plain error to permit the prosecution, in a case involving an insanity plea, to elicit testimony about the conclusions reached by a non-testifying psychiatrist who had examined the defendant two days after the alleged criminal acts.

According to the Court, “when the State elected to introduce [the statement of a non-testifying scientific expert], [that expert] became a witness [the defendant] had the right to confront.” *Id.* at 530 (quoting *Bullcoming*, 131 S Ct at 2716 (alterations in original)). As in *Fackelman*, when the State here elected to introduce the conclusions of Smallwood through the testimony of Jones and Ross, Smallwood became a witness for the State, and Mr. Randolph had a right to confront her.

Given Jones’s admission that she had never given the test or seen it administered before and had never even read the directions on the test kit, the only basis upon which she could testify that there was a reaction would be if the technician who performed the test informed her of one. Jones confirmed this is what happened, when she stated “I was told that it would turn blue.” (T3, 18). Ross more explicitly admitted “[t]here was some reaction I was advised by the identification bureau technician, Ms. Alona Smallwood that there was some –” (T3, 23). Defense counsel then objected (citing hearsay, but not the Confrontation Clause), but when the objection was sustained, counsel failed to move to strike Ross’s prior testimony. So it just hung there for the jury to consider without any instruction to disregard it.

The Court of Appeals erroneously stated that there was not sufficient information in the record to determine if these statements were “testimonial” (Op at 7-8). Smallwood’s statements about Mr. Randolph’s positive reaction to this test were clearly “testimonial.” Mr. Randolph had been “placed in custody” and brought to the police station (T3, 8). Smallwood was a technician who worked for the police department and was called in to “process[] ... a [murder] suspect” (T3, 23). Thus, the test was performed with an eye toward future prosecution. *See Crawford*, 541 US at 56 n7 (“Involvement of government officials in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse.”). Because Smallwood was never presented as a witness, Mr. Randolph never had an opportunity to confront her and the admission of her statements through two surrogates violated his Confrontation Clause rights. The Court of Appeals’s contrary conclusion was error.

Ground #5: The test result was irrelevant without a qualified expert to interpret it and should have been excluded under MRE 401 and 402. Any minimal probative value the evidence had was substantially outweighed by the danger of unfair prejudice, and it should have been excluded under MRE 403.

MRE 401 defines relevant evidence as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence,” and MRE 402 explains that irrelevant evidence is not admissible. The Court of Appeals erroneously held that the preliminary gunshot residue evidence “was relevant to defendant’s identity as the shooter because it provided a basis for concluding that he had recently fired a gun” (App A. at 8).

Balash’s expert testimony (which the trial court found credible) reveals that the Blue View test does not provide any basis for concluding that a person has recently fired a gun (H1, 14-15; App. D at 1-2). There is no basis for disregarding the trial judge’s factual findings that Mr. Balash was credible. The test here was a *preliminary* one, and it was based on a widely-repudiated nitrate analysis that Michigan courts, prosecutors, police officers, and experts have all found unreliable. *See supra*. As Balash explained, the Blue View Gun Residue Test does not tell you if a person has gunpowder residue on his or her skin and/or clothing (H1, 14-15); *see also Daniel*, 2014 WL 3844010, at \*17, attached as App. F (noting that “[t]he absence of gunshot residue ... would not have established that [defendant] did not fire a firearm, and presence of residue also would not have proven that he fired a weapon”).

*Assuming arguendo* that the test *might* accurately demonstrate the presence of nitrates (a fact that the peer review studies Balash discussed disputes), the fact that the test solution turned blue in Mr. Randolph’s case is irrelevant absent admissible expert testimony about what a blue test result means. All Jones and Ross could legitimately testify to was seeing blue in the test packet. Without a qualified expert to explain what the color blue meant, this testimony was irrelevant. As MRE 104(b)’s conditional relevance provision provides, “When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the

condition.” Here, *assuming arguendo* that a positive result on a nitrate test is minimally relevant, the fact that the solution turned blue is only relevant if blue indicates a positive result on the nitrate test. Because no competent testimony was offered regarding the meaning of a blue test solution, testimony about seeing the color blue appear was irrelevant. Stated differently, the prosecution did not offer any admissible “evidence sufficient to support a finding of the fulfillment of the condition” in this case – namely that blue yields a positive result for nitrates.

In fact, the lack of competent testimony about what a blue test solution means and how the jury should weigh it meant that testimony about the test solution turning blue should also have been excluded under MRE 403. The probative value of evidence that “has so little tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable” is often substantially outweighed “by the danger of unfair prejudice, confusion,” and the potential to mislead the jury. *Chouman v Home Owners Ins. Co.*, 293 Mich App 434, 449-50 (2011). Here, the jury was left with the unfairly prejudicial inference that a blue test solution on this preliminary gunshot residue test could only mean that Mr. Randolph had gunpowder on his hands the night of the shooting. As Balash explained, common substances regularly in the environment, including traces of urine on a person’s hands after using the bathroom, often contain nitrates and can cause the test solution to turn blue. (H1, 13-14).<sup>6</sup>

This Court has recognized that, “under MRE 403, a trial court has a ‘historic responsibility’ to ‘always determine whether the danger of unfair prejudice to the defendant substantially outweighs the probative value of the evidence sought to be introduced ....’” *People v Musser*, 494 Mich 337, 331 (2013). As discussed *supra*, if this preliminary gunshot residue test result had *any* legitimate probative value, it was extremely low given that it only detects nitrates,

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<sup>6</sup> At one point, the Court of Appeals indicated that there was no unfair prejudice to Mr. Randolph, because “there was no evidence that defendant had recently handled other substances containing nitrates from which to infer that something other than gunpowder led to the positive test result.” (App. A at 10). This statement is curious given Balash’s testimony that urine contains nitrates. It is a matter of common knowledge that men regularly urinate.

which are found in many commonly-used substances. In contrast, the potential of this seemingly-scientific evidence to unfairly prejudice the jury is extremely high. “Unfair prejudice may exist where there is a danger that the evidence will be given undue or preemptive weight by the jury or where it would be inequitable to allow use of the evidence.” *People v Blackston*, 481 Mich 451, 462 (2008). For decades, courts have understood that “[s]cientific proof may in some instances assume a posture of mystic infallibility in the eyes of a jury of laymen.” *United States v Addison*, 498 F 2d 741, 744 (CA DC, 1974); *see also United States v Amaral*, 488 F 2d 1148 (CA 9, 1973) The United States Supreme Court has emphasized the potential of junk science to improperly influence or mislead jurors. *See Daubert*, 509 US at 595 (“[E]xpert evidence can be both powerful and quite misleading” so “the judge in weighing possible prejudice against probative value under Rule 403 ... [must] exercise[] more control....”). The potential for this test to mislead the jury was particularly high here given that no one with any expertise explained what the test does and, more importantly, does not show. Jurors were not educated about how the test is performed, what it detects, or how pervasive nitrates are. Rather, they were just told that there was a positive reaction to a scientific gunshot residue test performed on the defendant’s hands the night of the shooting. Jurors likely concluded that this test indicated that Mr. Randolph has fired a gun that evening – a devastating fact in this entirely circumstantial case.

The Court of Appeals erroneously rejected Mr. Randolph’s MRE 403 argument noting that “there was little danger that the jury would give it undue weight because the parties agreed that it was not particularly significant” (App. A at 8). The trial judge himself explained why that conclusion is wrong. When Balash finished his direct testimony, the trial judge said, “all those TV cop shows talk about gun powder residue” (H1, 21). The judge then emphasized that “5 times a year in the cases I try ... the jury will send a question up to the police saying did you do a gunpowder residue test” (H1, 22). Juries look for gunpowder residue tests, because they erroneously believe these tests really do mean something. Importantly, there was no instruction that the jury should treat this seemingly-scientific test with caution. The prosecutor emphasized

the gunpowder residue test as a key piece of evidence that the jurors should look for in his opening statement (T1, 141). And the prosecutor, while downplaying the evidence somewhat in closing, still emphasized that it was “a factor” that should inform the jury’s deliberations (T4, 86). The fact that it is scientific evidence that “all those TV cop shows talk about” and that jurors routinely ask for, even in cases when it isn’t presented, reveals that jurors think this is important evidence and are likely to be swayed by it – particularly in a circumstantial case.

***The Court of Appeals erred when it held that trial counsel’s failure to object to testimony about this preliminary gunshot residue test did not amount to ineffective assistance of counsel.***

Mr. Randolph’s trial attorney was constitutionally ineffective for failing to recognize and/or properly raise objections and challenges to this highly prejudicial, seemingly-scientific testimony. Mr. Randolph has a constitutional right to effective trial counsel under the United States and Michigan Constitutions. US Const, amend VI; Mich Const 1963, art 1, § 20; *see also Strickland v Washington*, 466 US 668, 686 (1984) (“[T]he right to counsel is the right to the effective assistance of counsel.”) To demonstrate constitutionally ineffective performance, the defendant must show (1) that trial counsel performed deficiently and (2) that he suffered prejudice as a result of counsel’s missteps. *Id.* at 687; *People v Pickens*, 446 Mich 298, 302-03 (1994). The Court of Appeals erroneously held that Mr. Randolph’s claim failed on both prongs.

**Deficient Performance.** Deficient performance exists when “counsel’s representation f[alls] below an objective standard of reasonableness ... considering all the circumstances.” *Strickland*, 466 US at 688. The Court of Appeals recognized that trial counsel’s failure to object to inadmissible testimony about the results of the preliminary gunshot residue test was part of counsel’s trial strategy and therefore not deficient (App. A at 10). More specifically, the Court of Appeals found that trial counsel’s strategy was “not to exclude the evidence because defendant wanted he jury to know that he had been released despite the positive test result, which indicated that the result was not significant.” (App A. at 10). This was error for four reasons: (1) trial counsel initially objected to this evidence at trial and admitted that he wanted to exclude it, thus

revealing that it was not his strategy to admit it; (2) the purported strategic reason that trial counsel ultimately offered is contradicted by the trial record and constitutionally unreasonable; (3) trial counsel admitted his reasons for not challenging the evidence were based on mistakes and/or an erroneous interpretation of the law rather than on some strategy; and (4) even if the evidence was going to be admitted, trial counsel's failure to challenge the test results by presenting evidence to the jury about the many substances in the environment that could cause the preliminary gunshot residue test to show a reaction even when a person had not recently fired a gun constitutes deficient performance.

Trial counsel claimed he intended to allow the results of the Blue View test to be admitted to emphasize that police released Mr. Randolph after the test, because that is what Mr. Randolph wanted (H1, 49, 69). But when Jones began to testify about the results of the Blue View test, trial counsel objected (T3, 9). Counsel admitted he objected because he was trying to prevent Jones from testifying to the results or meaning of the test (H1, 54). The trial court credited this testimony and emphasized that "Attorney Clark wanted to prevent Officer Valencia Jones's testimony about 'a reaction' ..." (App. D at 2). Similarly, when Ross began to testify about the test results, defense counsel again objected (T3, 23-24). Defense counsel admitted that he was trying to exclude Ross's testimony about the test results as well (H1, 59-60).

If trial counsel's strategy truly was to admit evidence about this test, he would not have objected when the evidence was offered. His stated reason for objecting was that these witnesses were lay witnesses who were not qualified to testify to the test results (H1, 54). But if he wanted the test results to come in, it is unclear why it would matter through whom they came in. Both Jones and Ross would have been able to testify about Mr. Randolph's release from custody that night even without the test, which would have served trial counsel's alleged strategy. Moreover, trial counsel knew from the prosecution's opening that it was intending to present the results of this Blue View test through Jones (H1, 64-65). Therefore, objecting to it when Jones testified could have prevented it from coming in entirely – a fact that would be contrary to trial counsel's

asserted strategy. Counsel's actions at trial demonstrate that he had no pre-formulated strategy to admit these test results. Rather, his actions indicate that he recognized the testimony should not have been admitted so he objected to it, but he failed to follow through with his objections and these witnesses were impermissibly permitted to testify that they saw the test solution turn blue and that this indicated a positive reaction on the test for gunpowder (T3, 7-11, 23-24).

Moreover, trial counsel did not ask Jones or Ross a single question about Mr. Randolph's release. In fact, there is nothing in the entirety of Jones and Ross's testimony indicating that Mr. Randolph was let go after this test was performed (T3, 4-26). If trial counsel's strategy was to point out that the police tested Mr. Randolph's hands and then let him go, one would think there would have been at least one question of Jones or Ross about the fact that Mr. Randolph was released that night, but there was not. This shows more than trial counsel's failure to "pursue this strategy in the most logical and straightforward manner" (App. A at 10). It demonstrates that he never had that strategy in the first place. There was no strategic decision to allow this testimony, and the lower courts' contrary findings are erroneous.

*Assuming arguendo* that trial counsel consciously chose to allow the test results to be disclosed, that decision was unreasonable. "[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 US 668. Trial counsel, by his own admission, did not investigate the Blue View test (H1, 48). He did not research the science behind the test (H1, 48), and he never consulted an expert (H1, 53). There was no investigation at all, let alone a reasonable one. Nor can trial counsel make an after-the fact claim that he made a reasonable decision not to investigate. As the Sixth Circuit has explained, "[a] purportedly strategic decision is not objectively reasonable when the attorney has failed to investigate his options and make a reasonable choice between them." *Towns v Smith*, 395 F3d 251, 258 (CA 6 2005). If counsel "abandon[s] their investigation at an unreasonable juncture, making a fully informed decision with respect to [] strategy impossible," that is ineffective assistance. *Wiggins v Smith*, 539 US

510, 527-28 (2003). Trial counsel admitted he never considered moving in limine to exclude the Blue View test (H1, 53). He did no research on the test itself. Rather, he chose not to even investigate the test based on a conversation with his client during their first meeting in which Mr. Randolph said that he wanted “to emphasize to the jury that the police released him after that test” (App. D at 2). Trial counsel admitted that he never explained to Mr. Randolph that there might be an alternative – that they could exclude these damning test results altogether so that the jury still could have heard about his release without hearing baseless and misleading “scientific” evidence that he had recently fired a gun (H1, 49). He just never considered it.

ABA Standard for Criminal Justice 4-5.1 indicates that defense counsel “should exercise independent professional judgment when advising a client.” *See also Strickland*, 466 US at 688 (indicating that “prevailing norms of practice as reflected in the ABA standards are guides to determining what is reasonable”). Trial counsel did not exercise any independent professional judgment, and he did not advise his client at all. In this circumstantial case, trial counsel never bothered to consider, research, or discuss with his client that there might be a way to exclude seemingly-scientific test results suggesting that his client had fired a gun on the night of the victim’s murder (H1, 49). Trial counsel could have explained to Mr. Randolph that the test was junk science that, if not excluded, would have a powerful effect on a jury. *See, e.g., United States v Addison*, 498 F 2d 741, 744 (CA DC, 1974) (“Scientific proof may in some instances assume a posture of mystic infallibility in the eyes of a jury of laymen.”). Counsel could have told Mr. Randolph that they could still emphasize that he was arrested and released on the night of the murder even without this damning evidence being entered in evidence.

Nor was it correct to excuse trial counsel’s failures by claiming he was merely pursuing a strategy that was “dictated by Defendant” (App. D at 2; App. A at 10). Following a client’s wishes after thorough investigation, consultation, and advisement can certainly be strategic in some circumstances. But, as ABA Standard for Criminal Justice 4-4.1, explicitly states, “[t]he duty to investigate exists regardless of the accused’s statements to the lawyer that there should be

no investigation.” Here, trial counsel never testified that Mr. Randolph told him not to investigate. Trial counsel did not testify that Mr. Randolph ever insisted that these test results be admitted into evidence, knowing that they could easily have been excluded. Rather, the only testimony is that Mr. Randolph was trying to find ways to discredit the test results and his attorney never advised him that it would be possible to exclude the results altogether. Thus, it is readily apparent that any “insistence” was based on the flawed premise that the test results would come in regardless of any objection. ABA Standard for Criminal Justice 4-4.1 further indicates that “[t]he resources of scientific laboratories may be required to evaluate certain kinds of evidence [and neglect of] these steps may preclude the presentation of an effective defense.” Had trial counsel investigated the science behind this test, he could have discussed with his client the possibility of excluding the test entirely. The failure to investigate and resultant failure to advise Mr. Randolph about the risk of the evidence and about his range of strategic options is constitutionally unreasonable. Counsel “failed to investigate his options and make a reasonable choice between them.” *Towns*, 395 F3d at 258. Rather, he simply “abandon[ed] the[] investigation at an unreasonable juncture, making a fully informed decision with respect to [] strategy impossible.” *Wiggins*, 539 US at 527-28. That is ineffective assistance. *Id.*

With respect to his failure to continue to object to Ross’s testimony after his initial hearsay objection was sustained, trial counsel again tried to proffer an after-the-fact strategic reason that is belied by the record and constitutionally unreasonable. He claimed that there was no need to object further to Ross’s testimony, because Ross “had already admitted that he didn’t know what the test meant or what it did ... as far as the jury knew, they knew that Trooper Ross didn’t know what he was talking about. He was totally discredited as to – as to the test” (H1, 63). The trial judge credited this testimony (App. D at 2). This factual finding is clearly erroneous and unsupported by the trial record. When Ross testified that Mr. Randolph’s hands reacted on this test, there had been no testimony about his qualifications, and nothing had discredited him or suggested that he knew nothing about the test (T3, 23-24). Trial counsel went on to suggest it

was unnecessary to object to Ross's testimony because, "then in a few moments later if you go through the testimony he testifies that they released Mr. Randolph. They – even they knew the test didn't tell 'em anything, so they sent him home." (H1, 63). Once again, this testimony is belied by the record. Ross never said that Mr. Randolph was released after the test was performed – he was never even asked about it.

Moreover, *assuming arguendo* that the failure to object to Ross's testimony was strategic, it was constitutionally unreasonable. *See Roe v Flores-Ortega*, 528 US 470, 481 (2000) ("The relevant question is not whether counsel's choices were strategic, but whether they were reasonable."). The fact that Ross did not understand what the test meant may have discredited Ross from being perceived as an expert, but it certainly did nothing to discredit the test itself. And the jury had been told by Jones that a blue reaction on the rest meant that a person had gunpowder residue on his hands (T3, 9-10, 18). So even if Ross was not an expert, the jury would understand his testimony to mean that Mr. Randolph had gunpowder residue on his hands.

At the *Ginther* hearing, trial counsel revealed the true reason why he did not think to investigate and challenge the Blue View test results as junk science pre-trial. He believed that "it was going to come in more than likely" (H1, 50). He was unaware of any law suggesting otherwise (H1, 50-52) even though a simple Westlaw search would have revealed a wealth of cases (including *People v Young*, 425 Mich 470, 500 (1986)) discussing the unreliability of nitrate-based gunpowder tests. He admitted "all preliminary tests are junk science but they're admissible in a lot of places because it doesn't go to admissibility; it goes to weight" (H1, 70). He further testified he did not want to get into a battle of experts (H1, 69). These statements betray a fundamental misunderstanding of the law. Junk science is clearly not admissible. *See Daubert*, 509 US 579; *Gilbert*, 470 Mich 749. Counsel's belief that the unreliable nature of a test goes to weight is not a trial strategy; it is an error of law. His suggestion that he wanted to avoid a battle of the experts in front of the jury similarly misunderstands trial procedure. A *Daubert* motion in limine is not conducted before a jury – something he admitted during the hearing (H1,

70). Thus, all his claims about wanting to avoid a “battle of the experts” in front of the jury have nothing to do with why he did not investigate and challenge the test pre-trial.

The Sixth Circuit has made it clear that, “it is not sufficient for counsel to merely articulate a reason for an act or omission alleged to constitute ineffective assistance of counsel. The trial strategy itself must be objectively reasonable.” *Miller v Francis*, 269 F3d 609, 616 (CA 6 2001). A lawyer cannot simply incant that he made a strategic decision. *See id.* (“[T]he noun ‘strategy’ is not an accused lawyer’s talisman that necessarily defeats a charge of constitutional ineffectiveness.”). In this case, there would have been nothing to lose and everything to gain by moving to exclude this Blue View test. Had he gotten it excluded, trial counsel still could have pointed out that his client was arrested and released the night of this shooting because there was not enough evidence to hold him. Thus, he could still have honored his client’s wishes and demonstrated the sloppiness of the police investigation.

Trial counsel’s errors in this case extended beyond the pre-trial stage into the trial itself. At times, trial counsel was quite candid about his trial errors. For example, when asked why he did not object to Jones and Ross’s testimony on Confrontation Clause grounds, trial counsel admitted that he “missed” those objections (H1, 65). This was not strategy; it was simply error. Trial counsel also did not offer a strategic reason for failing to re-raise his initial objections (both of which were sustained) to Jones and Ross’s testimony. He admitted that he knew that these officers were lay witnesses who were not qualified under MRE 701 and 702 to offer expert testimony (H1, 54-55) and he wanted to exclude their testimony (H1, 54, 59-60). But even after his initial objections were sustained, he failed to re-raise them. Trial counsel admitted that if he “had spent 4 or 5 or 6 hours [he] might have been able to find something” in terms of case law or statutes that would have kept out the observational testimony of Jones and Ross in relation to the color change on the preliminary gunshot residue test (H2, 42). He chose not to do that research (H2, 42), not because of some strategy but because of laziness.

*Assuming arguendo* that the gunshot residue testimony was admissible, defense counsel still had a duty to investigate what a positive reaction to this test meant and make reasonable strategic decisions about how to counter the implications of the results. *See Strickland*, 466 US at 691 (noting that counsel “has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary” based on trial strategy). Had counsel consulted an expert or done a minimal amount of research, he would have learned that this test only detects the presence of nitrates, which are found all over the place and easily transferred to peoples’ hands (H1, 13-14); *see also People v Huddleston*, 530 N E 2d 1015, 1025 n.2 (Ill App 1988) (emphasizing “residue from products such as bleaching agents, chemicals, cosmetics, explosives, fertilizers, and tobacco can trigger positive reactions” on nitrate-based tests). It appears that defense counsel understood this because he asked Jones “[d]o you know for sure if it’s supposed to turn like a light blue if there’s a possibility of some chemical like nitrates....” (T3, 18). Yet, defense counsel did not cross examine these police witnesses about the many other substances that could have triggered a “positive” reaction to this preliminary test. Nor did he present any affirmative evidence of to show that contact with any number of substances *other than gunpowder* could generate a positive result on this test. Instead, defense counsel just emphasized that the test was a preliminary one and tried to show the police officers did not know much about it. Neither of those lines of questioning actually impeached the veracity of the test results. Demonstrating that the test often falsely suggests the presence of gunpowder would have been a far more powerful way to impeach the results. No reasonable trial strategy could support a failure to challenge the underlying science of a scientific test that inculcates the defendant.

**Prejudice.** Mr. Randolph must show that he was prejudiced by counsel’s deficient performance to succeed on his ineffective assistance claim. *See Strickland*, 466 US at 687. Prejudice means that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine the confidence in the outcome.” *Id.* at 694. That standard is

lower than the preponderance of the evidence standard, and “a defendant need not show that counsel’s deficient conduct more likely than not altered the outcome in a case.” *Id.* at 693.

In opening statements, the prosecutor explained that the gunpowder residue was one of the primary pieces of evidence that would link Mr. Randolph to the crime:

So between the fight he got into with his girlfriend, the police being called, you’ll be able to see the anger building and building over the course of the day. You will hear the threats, both that got recorded and ones that were made in passing to the witnesses that you’ll hear from.

Then after that you’ll get to piece that to the killing. The gunpowder residue, the matching gun with the matching bullets in the victim’s body.

(T1, 141) (emphasis added). At trial, the State called two different witnesses to testify to the results of this gunpowder residue test. In fact, the gunpowder residue test was the sole purpose of Ross’s testimony. The State’s case against Mr. Randolph was circumstantial – a fact that the prosecutor recognized when he devoted time during voir dire to speaking with prospective jurors about their views on circumstantial evidence (T1, 38-42). The above-quoted excerpt from the prosecutor’s opening outlined four pieces of evidence that were critical to the State’s case: (1) Kanisha and Mr. Randolph had had a physical fight the morning of the shooting; (2) Mr. Randolph threatened to harm or kill Kanisha’s family members that day; (3) gunpowder residue was found on Mr. Randolph’s hands that night; and (4) the murder weapon was found at Mr. Randolph’s brother’s apartment two months later when Mr. Randolph was present there.

With respect to the first two pieces of evidence, testimony showed that Mr. Randolph and Kanisha fought regularly (T1, 152-87), that the courts had been involved (T1, 173-74), and that Mr. Randolph regularly threatened to harm or kill Kanisha’s family members, but nothing had ever come of it (T2, 16-19, 45-48, 51-53). Thus, the testimony about the fight that morning and the threats, although important, was insufficient standing alone to warrant a conviction. The murder weapon found at Mr. Randolph’s brother’s house was obviously a critical piece of the State’s case, but the jury also heard that Mr. Randolph’s brother was on parole at the time (T4,

48), and the weapon was found in a room that was identified as the brother's room (T4, 43-44, 47). Thus, the primary link between Mr. Randolph and the gun was gunpowder residue on his hands the night of the murder.<sup>7</sup> The gunpowder residue could lead the jury to believe that the gun belonged to Mr. Randolph and not his brother.

The preliminary gunpowder residue test was the State's strongest piece of evidence for arguing that Mr. Randolph had possessed and fired a gun that night. It had that "mystic infallibility" that jurors often associate with scientific proof. *United States v Addison*, 498 F 2d 741, 744 (CA DC, 1974). As one evidence expert explained it:

Scientific evidence impresses lay jurors. They tend to assume it is more accurate and objective than lay testimony. A juror who thinks of scientific evidence visualizes instruments capable of amazingly precise measurement, of findings arrived at by dispassionate scientific tests. [Scientific evidence] has a special aura of credibility.

Edward J. Imwinkelreid, *Evidence Law and Tactics for the Proponents of Scientific Evidence* in SCIENTIFIC AND EXPERT EVIDENCE 33, 37 (Imwinkelreid ed. 1981). The US Supreme Court has emphasized the potential of junk science to improperly influence or mislead jurors. *See Daubert*, 509 US at 595 ("[E]xpert evidence can be both powerful and quite misleading....").

In fact, the trial court itself recognized how powerful and potentially prejudicial gunshot residue tests are. After Balash's direct examination, Judge Neithercut said, "all those TV cop shows talk about gunpowder residue" (H1, 21) and noted that "5 times a year, cases I try ... the jury will send a question up to the police saying did you do a gunpowder residue test." (H1, 22). Juries look for gunpowder residue tests, because they erroneously believe these tests mean something. Importantly, there was no instruction that the jury should treat this seemingly-scientific test with caution. There was no questioning whatsoever suggesting that the test was anything but valid for determining the presence of gunpowder. Yes, there was some testimony that Jones and Ross were not the qualified witnesses to talk about it, but they were able to share

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<sup>7</sup> The fact ammunition was found in his possession was also relevant, but that is discussed *infra*.

the results with the jury and nothing impeached those results. Without that testimony there is a “reasonable probability” that the outcome of the trial would have been different.

To dispose of the prejudice argument, the Court of Appeals embarked on a misguided and highly speculative explication of what the prosecutor *could have* but *did not* actually do to counter any possible prejudice (App. A at 10). The Court of Appeals speculated that “had counsel pressed a hearsay objection to Jones’s testimony, the prosecutor *may have* simply called in an expert to testify” and then defense counsel “*could have* then called his own expert to discredit the evidence .... Further, the competing experts *could not have said* that a positive test result meant the defendant did fire a gun, because the test only detects nitrates, not gunpowder, *nor could they have said* that the nitrates were or were not from gunpowder. Thus, the evidence *would have been* suggestive, not conclusive.” (App. A at 10 (emphasis added)). *Strickland* itself dictates that, in making a prejudice determination, the court “must consider the totality of the evidence *before the judge or jury.*” *Strickland*, 466 US at 695. The State did not present any competing expert testimony at the *Ginther* hearing, and there is nothing in the record to suggest that the State would have called an expert to testify had trial counsel pressed the hearsay objection. (The State did not even bother to call as a witness the technician who actually performed the test, so there is little reason to believe that it would have retained an expert to testify.) Moreover, it is fanciful to believe that defense counsel would have presented any expert testimony to rebut a prosecution expert given his own admissions that he had done no investigation or research into the matter. Thus, contrary to the Court of Appeals’s improbable speculation, the most probable outcome had trial counsel objected to the preliminary gunshot residue test evidence was that it would be excluded altogether. That would have made a difference in this circumstantial murder case.

***The error was so obvious and prejudicial that it constitutes plain error.***

To prove plain error, a “defendant[] must show that (1) error occurred, (2) the error was plain, i.e., clear or obvious, and (3) the plain error affected a substantial right of the defendant.”

*People v Pipes*, 475 Mich 267, 279 (2006). For the reasons discussed above, the trial court should have recognized that testimony about the test results by unknowledgeable surrogates violated Mr. Randolph's constitutional rights to a fair trial and to confront the witnesses in addition to numerous evidence rules. This clear error affected his substantial rights to (a) confront the witnesses against him, *see Fackelman, supra*, and (b) have a fair trial predicated on reliable and probative evidence that did not have the potential to unfairly prejudice the jury, *see* US Const, Am XIV; Mich Const 1963, art 1, § 17 (protecting a defendant's right to due process and fundamental fairness), and the Court of Appeals's contrary conclusion was error.

**II. THE COURT OF APPEALS ERRED IN HOLDING THAT THE ERRONEOUS ADMISSION OF PREJUDICIAL HEARSAY REPORTS OF ALLEGED THREATS MADE BY MR. RANDOLPH DID NOT REQUIRE REVERSAL, EITHER UNDER THE PLAIN ERROR STANDARD OF REVIEW OR UNDER THE STANDARD OF REVIEW FOR INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS.**

**STANDARD OF REVIEW**

Constitutional questions are reviewed de novo and any associated findings of fact are reviewed for clear error. *People v LeBlanc*, 465 Mich 575, 579 (2002). Unpreserved errors are reviewed for plain error. *See People v Carines*, 460 Mich 750 (1999).

**FACTUAL BACKGROUND**

Linda Wilkerson, the sister of Vena's fiancé, testified that she arrived home on December 10, 2012 and found Vena sitting on the couch, watching TV, and conversing with her friend, Liz (T2, 6). After the friend left, Wilkerson testified that Vena told her, "That nigger [Mr. Randolph] been calling all day threaten' to kill the family, especially Lo<sup>[8]</sup> and Vontay<sup>[9]</sup>" (T2, 7). Wilkerson went on to testify that Vena "said she wanted me to call my son and tell him what he had said, what was going on, that he was saying that he was going to kill the family, so they wanted – she

<sup>8</sup> "Lo" was a nickname for Linda Wilkerson's son (T2, 8).

<sup>9</sup> "Vontay" was a nickname for Vena Fant's nephew (T2, 8).

wanted my son to be aware of this – that he might cause some trouble with him” (T2, 8). Trial counsel did not object to any of these questions or answers. Jones later testified that “[t]he family had stated that the defendant had left several threatening messages on their answering machine.” (T3, 13). No foundation had been laid about which member(s) of the family had made that statement or under what circumstances. No objection was made to this testimony.

#### **ARGUMENT**

Wilkerson and Jones’s testimony was inadmissible hearsay that should have been excluded. Trial counsel was constitutionally ineffective for failing to object to each line of questioning, and it was plain error for the trial court to admit them. Moreover, because the threats contained in this testimony were central to the prosecution’s case, their erroneous admission constitutes reversible error, and the Court of Appeals erred in concluding otherwise.

Hearsay is “a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted” MRE 801(c). Hearsay is not admissible unless an exception applies. MRE 802. These threats were admitted to prove the truth of the matter asserted – namely that Mr. Randolph was threatening the family, and was therefore the one who probably killed Vena. The prosecutor admitted that Vena’s statements to Wilkerson alleging that Mr. Randolph had “been calling all day threaten’ to kill the family, especially Lo and Vontay” were hearsay (App. A at 4), but it contended that the statements were admissible as excited utterances.

The excited utterance exception is not applicable on these facts. Under MRE 803(2), “[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition” is admissible as an exception to the hearsay prohibition. Three conditions must be satisfied before a statement is admissible as an excited utterance: “(1) that there is a startling occasion, startling enough to produce nervous excitement, and render the utterance spontaneous and unreflecting; (2) that the statement must have been made before there has been time to contrive and misrepresent; and (3) the statement must relate

to the circumstances of the occurrence preceding it.” *People v Carson*, 87 Mich App 163, 167 (1978). Here, the prosecution failed to lay a sufficient foundation to satisfy these requirements.

The prosecution offered no testimony about when Mr. Randolph allegedly made his threatening call to Vena. Hours could have passed between that call and Vena’s statements to Wilkerson. At the very least, the phone call occurred before Wilkerson arrived at the house that evening (T2, 28). It is the offering party’s burden to establish the foundational requirements.

Of course, time alone is not dispositive. This Court has made clear that “[t]he question is not strictly one of time, but of the possibility for conscious reflection.” *People v Smith*, 456 Mich 543, 551 (1998). The *Carson* case is instructive. In that case, the Court of Appeals deemed a statement made by an alleged rape victim 4½ hours after the alleged assault took place to be inadmissible. 87 Mich App at 163. The court emphasized that, “although understandably upset, complainant engaged in activities requiring contemplation and reflective thought” such that her statement was not admissible. *Id.* at 168. The same is true here. The record reveals that Vena consciously reflected before deciding to share these statements with Wilkerson. Both Wilkerson and Miller, Vena’s fiancé, testified that Vena thought about and made conscious decisions about to whom to speak and what to say. Wilkerson explained that Vena “waited for Liz [her friend] to leave” before telling Wilkerson about this alleged threat. (T2, 7). She further explained on cross examination that “I don’t think she ... want[ed] Liz to know family business that was goin’ on” (T2, 27). Similarly, Miller explained that Vena didn’t tell him what Mr. Randolph had said to her on the phone, because “she figured it would upset me” (T2, 44). That type of “figuring” – choosing whom to share information with, waiting for one person to leave, using careful words so as not to reveal the content of what was said – those are the actions of a person who is “consciously reflect[ing],” not someone who is spontaneously uttering.

Moreover, Wilkerson’s testimony demonstrates that Vena was in a subdued and reflective emotional state rather than upset to the extent that she was unable to focus or contrive. *See Carson*, 87 Mich App at 169 (“In considering the ‘time for contrivance’ requirement a court

must examine ... whether the witness' emotional state during this time period rendered [her] capable of fabricating a story.”). Wilkerson testified Vena was “not her normal self,” was “kind of quiet,” and “kind of like tense, I guess, kind of anxious, tense like more” (T2, 7). Notably, Wilkerson did not say Vena was so upset, shaken, or distraught that she appeared unable to think or reflect. To the contrary, she seems to have been thinking and reflecting on her actions clearly.

In fact, this is not a case in which it is even clear that Mr. Randolph's phone call created Vena's emotional state. Wilkerson herself admitted that there was another reason why Vena would be subdued and anxious that day. She explained that December 10 was the anniversary of Vena's son and nephew's death (T2, 29). As Wilkerson put it, “she was kind of in to herself or, feelin', I don't know – her – that same day, her son had been – her nephew had been killed in a car accident some years before that so – the anxiety from that and what was goin' on with Vena's daughter and Andrew was a lot so ....” (T2, 29). Thus, it is unclear whether Vena's emotional state was attributable to the alleged startling event – the threat – or whether she was “not her normal self” because it was the anniversary of another tragedy.

With no foundation about the timing of this alleged threat, no testimony to demonstrate that Vena was in a particularly excited state, testimony demonstrating that Vena was reflecting and making conscious choices about with whom she would share information and at what time, and testimony indicating that her emotional state might have been caused by an altogether different event, there was an insufficient foundation to support the statement's admission as an excited utterance. As the Court of Appeals has explained, “[e]xcited utterances are deemed reliable, and thus admissible, on the theory that the startling event suspends the witness' reflective thought process and renders the person incapable of fabricating a story at the time the statement was made.” *Carson*, 87 Mich App at 167. Vena's reflective thought processes were not suspended in any way. She was fully capable of conscious reflection, and her statements to Wilkerson were inadmissible as a result.

Wilkerson's later testimony in response to the prosecutor's question, "How was it that Vena said it?" was also hearsay. The Court of Appeals erred in stating that it was "unclear whether Wilkerson gave an unresponsive answer by elaborating on what Vena had said, or whether Wilkerson answered the question by using tone and expression to demonstrate the manner in which Vena had related her conversation with defendant" (App. A at 4). The words that Wilkerson used demonstrate the hearsay nature of this testimony. Ms. Wilkerson testified "She [referring to Vena Fant] said, she's like, we better watch out. He said he's goin' get us, we better be on the alert. It was more or less like that type of – we better, we better watch out 'cause he said he's goin' get us, he' goin' kill us, he' goin' kill us." (T2, 9 (emphasis added)). Even if Wilkerson was testifying about the manner in which Vena made her statements, she did so through the presentation of the out-of-court statements themselves and without any limiting instruction on the purposes for which the jury could consider them. This testimony clearly conveys threats to kill the family that Vena told Wilkerson that Mr. Randolph had made to her that day. It was explicitly used by the prosecutor in closing to argue that Mr. Randolph was the killer (T4, 84, 89-90, 94, 95, 99) and is thus hearsay under MRE 801 and 802.

Finally, Jones's testimony that "[t]he family had stated that the defendant had left several threatening messages on their answering machine" (T3, 13) was also inadmissible hearsay used to suggest that Mr. Randolph had been threatening the family "all day" (T4, 89, 94, 95, 99) – a theme that the prosecutor relied on throughout his closing arguments to suggest that Mr. Randolph was the shooter. The Court of Appeals's finding that this testimony "was not offered to prove the truth of the matter asserted – i.e., to prove that defendant had left threatening messages, but was offered as part of the foundation for the admission of a threatening message recovered from the answering machine" (App. A at 5) is error. It was admitted without any limiting instruction, and the prosecutor repeatedly argued in closing that, after Mr. Randolph and Kanisha fought that morning, "[t]he defendant spent the next 12 hours stewing about this, being angry about this, calling, harassing, threatening the people involved in this." (T4, 84, 89, 94-95, 99,

120). This was one of those threats, and the prosecution used it substantively to argue that Mr. Randolph was the shooter.

***It was plain error to admit these hearsay statements.***

The lack of foundation to admit this blatant hearsay was immediately apparent on the face of the record, and the trial court plainly erred in admitting this highly inflammatory and improper hearsay testimony. The error here was “plain, i.e., clear or obvious,” and it “affected a substantial right of the defendant.” *People v Pipes*, 475 Mich 267, 279 (2006). When addressing Mr. Randolph’s plain error argument, the Court of Appeals admitted that “there is some evidence in the record to suggest that Vena was not overcome by the stress or excitement caused by the threat,” but then held that “the issue was not fully explored due to defendant’s failure to object. Therefore, we cannot conclude that any error is clear or obvious” (App. A at 4). However, the trial court did not need a defense objection to see that the prosecution had not laid a sufficient foundation to admit this obviously prejudicial hearsay testimony under any hearsay exception.

The Court of Appeals went on to state that, even assuming that plain error occurred, it did not affect defendant’s substantial rights (App. A at 4). This was also error. In its closing arguments, the prosecutor devoted 70 lines in the transcript to a discussion of Mr. Randolph’s alleged threats (T4, 84, 85, 89, 90, 92, 93, 94, 95, 99, 116, 119, 120). The prosecutor used the alleged threats not only to argue Mr. Randolph’s intent to kill (T4, 89-90, 92), but also to demonstrate that he must have been the shooter: “what are the odds that on that same night that he’s calling, Vena actually gets shot the way he’s saying it’s gonna happen?” (T4, 119).

The State’s primary response to the defense’s argument that Mr. Randolph was always making threats but never acting on them was to point to Wilkerson’s testimony about what Vena told her: “You know if she’s the peacemaker in this, she’s gotta have some tolerance for it, she’s gotta know when it’s bluster, like it always has been, or when it’s something more serious, and she was treating it like it was something more serious” (T4, 120). These threats were critical to the State’s case, and the trial court should have recognized their clear inadmissibility. *See People*

*v Fenner*, 136 Mich App 45, 47 (1984) (finding plain error and ineffective assistance of trial counsel for failing to object to hearsay evidence).

***Trial counsel was constitutionally ineffective for failing to object to this hearsay.***

Trial counsel's failure to object to this testimony was objectively unreasonable under *Strickland*, 466 US 668. Trial counsel indicated that he was concerned about these threats coming in because "the prosecution's case was was that he'd been threatening the family and now we find he did something about it" (H2, 45-46). When asked about the hearsay statements that Vena made to Wilkerson, trial counsel indicated that he "would have stopped it if [he] could" (H2, 48). Further, he recognized that it would have been better for his client if no testimony about alleged threats that Mr. Randolph had made to the victim's family that day were admitted into evidence (H2, 5). Yet he did not object. That was deficient performance.

Believing that he could not keep the threats out, trial counsel said that his strategy was to admit the hearsay and argue that Mr. Randolph was always threatening the family but never acted on it (H1, 72; H2, 14-15). Counsel's belief that he could not keep the threats out was based on an erroneous understanding of the law and thus is not entitled to deference. Moreover, this asserted strategy is belied by the record. Trial counsel objected when Jones testified to hearsay statements that Clayburn made about alleged threats that Mr. Randolph made to the family that day (T3, 6). Thus, it was not trial counsel's strategy to admit all of this hearsay evidence. Nor would such a strategy have been reasonable. *See Roe v Flores-Ortega*, 528 US 470, 481 (2000) ("The relevant question is not whether counsel's choices were strategic, but whether they were reasonable."). In a circumstantial case such as this one, the prosecution's case would have fallen apart if the hearsay threats that Mr. Randolph allegedly made that day had been excluded.

Mr. Randolph was prejudiced by counsel's failure to object. The prosecutor emphasized the hearsay statements throughout his arguments to the jury (T4, 84, 85, 89, 90, 92, 93, 94, 95, 99, 116, 119, 120). He used the alleged threats to argue Mr. Randolph's intent to kill as well as to demonstrate he was the shooter (T4, 89-90, 92, 119). Given the circumstantial nature of the

evidence against Mr. Randolph, the prosecutor asked the jury to rely on its common sense of probabilities to determine that Mr. Randolph was the killer: “Now what are the odds that on that same night that he’s calling, Vena actually gets shot the way he’s saying it’s gonna happen? That’s 1 in something, pretty big number on the bottom, that’s a pretty small probability” (T4, 119). The threats were critical to the prosecution and trial counsel provided constitutionally ineffective assistance in failing to object to them.

The Court of Appeals, when addressing Mr. Randolph’s allegation that his trial attorney was constitutionally ineffective for failing to object to this hearsay testimony, indicated that “defendant has failed to establish plain error in the admission of alleged hearsay statements regarding the threats he made and thus his claim of ineffective assistance of counsel must fail” (App. A at 10). But the Court has earlier indicated that there was no plain error with respect to Vena’s hearsay statements, because “the issue was not fully explored due to defendant’s failure to object” (App. A at 4). So, in the Court of Appeals’s view, if a defendant can’t demonstrate plain error because of his trial attorney’s deficient performance, he also automatically can’t demonstrate deficient performance because there is no plain error? This tautological interpretation of the relationship between plain error and *Strickland* is contrary to logic and also incorrect as a matter of law. In the next sentence of its opinion, the Court of Appeals continued, “[e]ven if we were to accept defendant’s claim that Vena’s first statement to Wilkerson was inadmissible hearsay, defendant cannot show that he was prejudiced by counsel’s failure to object for the reasons discussed earlier” (App. A at 10). What was discussed earlier, however, was why the Court of Appeals felt that the erroneous admission of this hearsay evidence “did not affect defendant’s substantial rights” (App. A at 4).

These sentences are indicative of a more general confusion in the lower appellate court about the relationship between plain error and *Strickland* ineffective-assistance-of-counsel claims. First, the Court of Appeals appears to believe that if an error is not “clear or obvious” on the face of the record under *Carines*, then there is automatically no deficient performance.

Consider its approach to Wilkerson's hearsay report regarding "how" Vena told her about Mr. Randolph's threats. The Court of Appeals indicated that there was no plain error, because the record was "unclear" regarding whether these were hearsay (App. A at 4). But that analysis should not foreclose a claim of deficient attorney performance for failing to conduct the requisite investigation to figure out that it was hearsay and raise the objection. Errors can be nonobvious on the face of a trial transcript, but still be errors that a competent defense attorney should have discovered. Second, the Court of Appeals appears regularly to conflate the prejudice inquiries in the plain error and *Strickland* standards as it appears to have done with respect to Vena's initial hearsay statements in this case. *See, e.g., People v Villagomez*, 2014 WL 1004193, at \*2 (Mich Ct App 2014) (attached as App. H) ("Defendant cannot establish that the challenged testimony affected the outcome of the trial, as required to warrant reversal under the plain error standard .... Because defendant cannot show the testimony was outcome determinative, his attendant claim of ineffective assistance of counsel must also fail."); *People v Hardy*, 2011 WL 4467759, at \*2 (Mich Ct App 2011) (attached as App. I) (finding error but indicating that it was not plain error because "it is not more probable than not that the admission of the evidence affected the outcome to defendant's detriment" and then rejecting an ineffective-assistance-of-counsel claim "for similar reasons" and noting that, "[i]n order to prevail, defendant must show that, had counsel made the objection, the outcome of the proceedings would have been different"); *People v Franklin*, 2008 WL 4274407, at \*2 (Mich Ct App 2008) (attached as App. J) ("Because we find that Ibrahim's testimony did not constitute plain error affecting defendant's substantial rights, defense counsel's failure to object did not comprise ineffective assistance."); *People v Williams*, 2009 WL 2136905, at \*3 (Mich Ct App 2009) (attached as App. K) ("The evidence recited by us above in determining that defendant's substantial rights were not affected under the plain-error test serves as a sufficient basis to find a lack of prejudice under the analysis governing review of an ineffective assistance claim.").

The plain error inquiry “generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings.” *Carines*, 460 Mich at 763. In contrast, the United States Supreme Court in *Strickland* explicitly rejected an outcome-determinative test and emphasized that “a defendant need not show that counsel’s deficient conduct more likely than not altered the outcome of the case,” but only that there was a “reasonable probability” that the result would have been different. *Strickland*, 466 US at 693-94. Other state courts have experienced confusion similar to that of the Michigan Court of Appeals. *See, e.g.*, Kristin Traicoff, *Closing Two Doors: How Courts Misunderstand Prejudice Under Olano and Strickland*, 21-WTR Crim Just 24 (2007). The highest courts in other states have taken cases to definitely resolve the conflict and explain that the plain error standard is higher than the *Strickland* standard. *See, e.g.*, *Ex parte Taylor*, 10 So 3d 1075 (Ala 2005); *Deck v State*, 68 SW 3d 418 (Missouri 2002). Although this Court has already stated in dicta that the plain error prejudice requirement is higher than the *Strickland* prejudice requirement, *see People v Fackelman*, 489 Mich 515, 537 n 16 (2011), the lower courts have continued to conflate them. This Court should grant this application for leave to appeal to resolve, once and for all for the lower appellate court, the relationship between these standards.

**III. THE COURT OF APPEALS ERRED IN HOLDING THAT THE TRIAL COURT’S ERRONEOUS ADMISSION OF A HEARSAY REPORT OF A THREAT TO KILL ALLEGEDLY MADE BY MR. RANDOLPH ON THE DAY OF THE SHOOTING (ADMITTED OVER DEFENSE OBJECTION) WAS HARMLESS IN THIS CIRCUMSTANTIAL MURDER CASE.**

**STANDARD OF REVIEW**

Defense counsel objected when the prosecutor asked Jones if Clayburn ever said that the defendant had threatened him (T3, 6), but the trial judge overruled the objection (T3, 8). A trial court’s determination of evidentiary issues is reviewed for abuse of discretion. *People v Adair*,

452 Mich 473 (1996). “[I]t is an abuse of discretion to admit evidence that is inadmissible as a matter of law.” *People v. Lukity*, 460 Mich 484, 488 (1999).

#### **FACTUAL BACKGROUND**

When questioning Clayburn about the fight between his mother and Mr. Randolph the morning of December 10, the prosecutor asked “[a]t any point did the Defendant threaten you or anyone else as he was leaving?” and Clayburn responded, “No. Not that I recall.” (T1, 190). The prosecutor did not ask any additional questions about threats. Instead, he later called Detective-Sergeant Valencia Jones to testify, that Clayburn told her “the defendant had threatened him and his mother that he would kill them earlier, during an earlier altercation that day.” (T3, 6-8). The defense objected to Jones’s testimony on hearsay grounds, and the trial court overruled the objection, accepting the prosecution’s argument that the testimony was admissible as a prior inconsistent statement under MRE 801. (T3, 8)

#### **ARGUMENT**

The prosecutor concedes and the Court of Appeals properly recognized that Jones’s testimony was impermissible hearsay (App. A at 3). The Court of Appeals erred in determining that Clayburn’s statement was harmless (App. A at 3). When evaluating prejudice with respect to a preserved evidentiary issue, “the appropriate inquiry focuses on the nature of the error and assesses its effect in light of the weight and strength of the untainted evidence [and asks] whether it is more probable than not that a different outcome would have resulted without the error.” *People v Lukity*, 460 Mich 484, 495 (1999) (emphasis added). The lower court failed to consider this error in light of the *untainted* evidence. Rather, it specifically included tainted evidence in its analysis of harmlessness, noting that there was evidence that the defendant had made threats that day and specifically referencing the inadmissible hearsay statements by Vena (App. A at 3).

The only testimony about threats that Mr. Randolph made that day that was admissible and untainted was an alleged threat that he made to Miller.<sup>10</sup> Miller said that Mr. Randolph called him and “was going off about the fight that him and Kanisha had, he said he felt, he was threatening and he was goin’ do somethin’ about it (sic)” (T2, 40). A person saying that he is angry about an earlier fight and is “goin’ do somethin’ about it” is different in kind from someone making a threat to kill. The prosecutor recognized this and argued in closing that the threats *to kill* that Mr. Randolph made to Vena and Clayburn that day were different in kind from the over-the-top, blustery threats that he had made on prior occasions (T4, 89-90, 99, 120).

Even standing alone, the admission of this threat to kill more probably than not affected the outcome. The prosecutor emphasized in closing that Mr. Randolph’s alleged threats to kill were an essential part of why the jury should believe that he was the shooter (T4, 99-100). It was the threats to kill that distinguished this day from other days when Mr. Randolph had fought with Kanisha and her family (T4, 89-90, 99, 120). Only two pieces of testimony dealt with threats to kill – this one, allegedly made to Clayburn that morning, and the phone call that Mr. Randolph allegedly made to Vena later that day. Both threats were not testified to by the person who heard them, but by third parties. Had there been only one such threat, relayed through a third party who did not hear it herself, the jurors could rightly be skeptical as to whether it happened. But a report of two such death threats makes each one seem credible. *Cf. People v Douglas*, 496 Mich 557, 581 (2014) (noting that corroborating evidence that adds “legitimacy” to another account can be prejudicial). Moreover, the fact that this threat came through a police officer’s testimony makes it particularly salient to the jury. As this Court recognized in *People v Stanaway*, 446 Mich 643, 695 (1994), a statement’s probative weight is heightened when it is delivered by a police officer. Police officers are trained to investigate crimes and are perceived by jurors as pseudo-experts. In fact, Michigan is so concerned about jurors giving improper weight to police officer testimony

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<sup>10</sup> There was also an answering machine message that Mr. Randolph left, which was played for the jury, but it did not contain any audible threats (T1, 172).

that there is a jury instruction designed to prevent jurors from giving it too much weight. *See* M Crim JI 5.11. That instruction was not read in this case. This was a circumstantial case that relied heavily on Mr. Randolph's alleged threats. The erroneous admission of the alleged threats was thus highly prejudicial and violated Mr. Randolph's right to a fair trial predicated on reliable and probative evidence that did not have the potential to unfairly prejudice the jury, *see* US Const, Am XIV; Mich Const 1963, art 1, § 1. The Court of Appeals erred in concluding otherwise.

**IV. MR. RANDOPHL WAS DENIED A FAIR TRIAL WHEN AMMUNITION FOUND IN HIS POSSESSIONS ON THE NIGHT OF THE SHOOTING, GUNS FOUND AT HIS BROTHER'S APARTMENT, AND THE BALLISTICS TESTS PERFORMED ON THOSE GUNS WERE ADMITTED INTO EVIDENCE, EVEN THOUGH THEY WERE FRUITS OF AN ILLEGAL SEARCH OF MR. RANDOLPH'S BELONGINGS THAT RELIED ON THE CONSENT OF A THIRD PARTY WHO DID NOT HAVE COMMON OR APPARENT AUTHORITY TO CONSENT. TRIAL COUNSEL WAS CONSTITUTIONALLY INEFFECTIVE FOR FAILING TO FILE A MOTION TO SUPPRESS THIS EVIDENCE.**

**STANDARD OF REVIEW**

The appropriate standard of review for this constitutional issue is *de novo*. *People v Trakhtenberg*, 493 Mich 38 (2012). Unpreserved errors are reviewed for plain error. *Carines, supra*. The associated claim of ineffective assistance of counsel for failing to move to suppress is a mixed question of law, reviewed *de novo*, and fact, reviewed for clear error. *LeBlanc*, 465 Mich at 579.

**FACTUAL BACKGROUND**

Kanisha testified that (1) she and Mr. Randolph were living together on the morning of December 10, 2012 (T1, 152); (2) during the night of their argument on December 9-10, Mr. Randolph packed his belongings in some garbage bags (T1, 164-65); and (3) she and Mr. Randolph had a conversation when he was packing up his belongings during which Mr. Randolph indicated that she and her kids could have "a weight bench [and] some stereo speakers,

you know, little things of that nature and that was kind of old anyway,” but he specifically said, “I just want my clothes and shoes,” referring to the bags that he had packed (T1, 165).

That morning, during their argument, Kanisha armed herself with a knife (T1, 169-70). Upon discovering that she had a knife, Mr. Randolph struggled with her telling her “just drop the knife and I’ll leave” (T1, 169-70). When she dropped the knife, he immediately picked it up and ran out (T1, 169-70). Kanisha admitted that Mr. Randolph was trying to call her all day that day but she did not answer the phone (T1, 171-72).

Vena and Miller delivered Mr. Randolph’s belongings to Mr. Randolph’s father’s house (T2, 39; H1, 28). Taylor (Randolph’s father) received the Mr. Randolph’s belongings, which included some plastic bags and a duffel bag, but he never touched them (H1, 28-30). He just left them in a pile in the living room for Mr. Randolph (H1, 30). After the shooting, Jones learned that Mr. Randolph’s belongings had been delivered to Taylor’s house earlier that day. (T3, 11). Even though Mr. Randolph was already in custody at the police station, (T3, 11), Jones opted not to ask him for consent to search his property. Nor did she get a warrant to search his belongings. Instead, she went to his father’s house and asked Taylor for consent to search Mr. Randolph’s belongings. (T3, 11). By her own admission, Jones was going to Taylor’s house with the purpose of searching Mr. Randolph’s belongings. (T3, 11).

Jones testified that the belongings were not open and strewn about; rather, they were consolidated in a pile. (T3, 12). Jones admitted that Taylor told her that the pile of stuff in which the ammunition was found belonged to Mr. Randolph (T3, 12). Taylor also told her he had not touched the bags (H1, 30-31). The police never asked Taylor if he had authority to consent to search (H1, 31). They just asked Taylor for consent to search and, based on that consent, searched Mr. Randolph’s belongings and found eight rounds of .357 ammunition. (T3, 12-13). Mr. Randolph was arrested that night and then released. He went to his father’s house to retrieve his belongings as soon as he was released (H1, 32).

Bernritter, a Sergeant with the Flint City Police Department who had been assigned out to the Bureau of Alcohol, Tobacco, and Firearms gun task force, testified that he got involved in this case in January of 2013. (T4, 37-39) He typically gets involved in homicide cases when “the detectives have narrowed their investigation down to usually a primary suspect, but they don’t at that time have enough to charge the actual homicide.” (T4, 38) He then tries to use federal statutes to assist them in collecting more evidence. (T4, 38). Upon learning that ammunition had been found in Mr. Randolph’s possessions, Bernritter obtained a federal arrest warrant for Mr. Randolph for felon in possession of ammunition. (T4, 39-42). On February 10, 2013, they got a tip that Mr. Randolph was staying at his brother’s apartment. (T4, 42) They executed the warrant and arrested Mr. Randolph. They also found out that Mr. Randolph’s brother was on parole. (T4, 48). Relying on the conditions of his brother’s parole, the police searched the apartment and found the handgun that was later linked to Vena’s homicide, another “long gun,” and an extra magazine for the handgun in a second-floor bedroom of the apartment. (T4, 43, 48).

#### **ARGUMENT**

The police violated Mr. Randolph’s constitutional rights when they searched his personal belongings without his consent and without a warrant. The ammunition and weapons that they obtained as a result of that constitutional violation should have been suppressed. The trial court plainly erred in admitting this evidence, and trial counsel was constitutionally ineffective for failing to object to it. With respect to the plain error argument, the Court of Appeals erred in holding that Mr. Randolph lacked standing to raise this challenge and further erred in suggesting that the record was insufficient to support suppression of the gun as a result of this violation. With respect to Mr. Randolph’s allegation of ineffective assistance of trial counsel, the Court of Appeals erred in holding that the failure to establish plain error meant that “his related ineffective assistance of counsel claims must also fail” (App. A at 10).

***The trial court plainly erred in admitting this physical evidence.***

The United States and Michigan Constitutions guarantee the right of persons to be secure against unreasonable searches and seizures. US Const Am IV; Mich Const 1963, Art 1 § 11. “[I]n *United States v Matlock*, 415 US 164, 171-72 (1974), the Supreme Court held that when the government seeks to justify a warrantless search by proof of voluntary consent, in the absence of proof that defendant consented, it ‘may show that permission to search was obtained from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected.’” *United States v Waller*, 426 F 3d 838, 845 (CA 6, 2005). Common authority rests “on *mutual use* of the property by persons generally having joint access or control for most purposes.” *Matlock*, 415 US at 171 n.7; *see also People v Brown*, 279 Mich App 116, 131 (2008) (same). In addition to the common authority doctrine, the Supreme Court has recognized an apparent common authority doctrine under which voluntarily consent is valid if “the facts available to the officer at the moment ... warrant a man of reasonable caution in the belief that the consenting party had authority” over the area to be searched. *Illinois v Rodriguez*, 497 US 177, 188 (1990); *People v Goforth*, 222 Mich App 306, 315 (1997) (same). The state has the burden of establishing the validity of a third party’s consent. *Rodriguez*, 497 US at 181.

In *Waller*, *supra*, the Sixth Circuit discussed when police could rely on a homeowner’s purported consent to search another person’s personal property. Waller had asked a friend (Howard) if he could store luggage, garbage bags of clothing, and food at Howard’s apartment in various places including the living room, bedroom, or bathroom closets. 426 F 3d at 842. Later, police went to the apartment to execute an arrest warrant that they had for Waller. *Id.* When they learned that Waller had been storing some property at the apartment, they asked Howard for consent to search the apartment and “began searching for personal items that Waller might have stored in the apartment.” *Id.* In Waller’s luggage bag they found two firearms. *Id.* The Sixth Circuit held that the seizure of these firearms violated Mr. Waller’s Fourth Amendment rights.

First, the Sixth Circuit held that Mr. Waller clearly had a reasonable expectation of privacy in his luggage. *Id.* at 844. Then, noting that Waller never gave Howard permission to open the luggage bag, and that Howard had never done so, the Sixth Circuit concluded that “Howard did not have *mutual use* of the luggage, nor did he have joint access and control *for most purposes*” and, as a result, “he did not have common authority to grant permission to search” it. *Id.* at 845-46 (emphasis in original). On the question of apparent authority, the Sixth Circuit held that “[w]here the circumstances presented would cause a person of reasonable caution to question whether the third party has mutual use of the property, ‘warrantless entry without further inquiry is unlawful.’” *Id.* at 846 (quoting *Rodriguez*, 497 US at 188-89). An officer has a “duty to inquire in ambiguous situations.” *Waller*, 426 F 3d at 847. Since “the circumstances made it unclear whether Waller’s luggage bag was ‘subject to “mutual use” by’ Howard[,] the officers’ warrantless entry into that luggage without further inquiry was unlawful.” *Id.* The Sixth Circuit noted that “[t]he officers’ failure to make further inquiry is especially pronounced in this case,” because both Howard and Waller were easily available for police questioning. *Id.* at 849. The court then emphasized:

The very purpose of the police presence was to search for (presumably) illegal possessions of Waller’s. Why would the police open the suitcase if they reasonably believed it belonged to Howard? The answer is that they would not have opened the bag. They opened the bag precisely because they believed it likely belonged to Waller. The police knew Waller was storing belongings at the Howard apartment. Most people do not keep a packed, closed suitcase in their own apartment. Deliberate ignorance of conclusive ownership of the suitcase does not excuse the warrantless search of the suitcase, especially when actual ownership could easily have been confirmed. ... [T]o hold that an officer may reasonably find authority to consent solely on the basis of the presence of a suitcase in the home of another would render meaningless the Fourth Amendment’s protection of such suitcases.

*Id.* (internal quotations omitted; emphasis in original); *see also United States v Karo*, 468 US 705, 725 (1984) (O’Connor, J., concurring) (“A homeowner’s consent to a search of the home may not be effective consent to a search of a closed object inside the home. Consent to search a

container or a place is effective only when given by one with common authority....” (internal quotations omitted)).

This case is remarkably similar to *Waller*. Mr. Randolph, like Waller, had a reasonable expectation of privacy in his duffel bag. Taylor, like Howard, “did not have *mutual use* of the luggage, nor did he have joint access and control *for most purposes*” and, as a result, “he did not have common authority to grant permission to search” it. *Id.* at 845-46 (emphasis in original). As in *Waller*, the circumstances in this case would warrant “a person of reasonable caution to question whether the third party [here, Taylor] ha[d] mutual use of the property.” *Id.* at 846. Jones testified that she believed that she was searching Mr. Randolph’s property, not his father’s. (T3, 11-12). As in *Waller*, no clarifying questions seem to have been asked to ascertain whether Taylor had mutual use of the property. As in *Waller*, both Mr. Randolph and his father were easily available if the police had wanted to ask questions: Mr. Randolph was in police custody and Taylor was with the police at the home. Here, as in *Waller*, the search of Mr. Randolph’s belongings was unlawful and a contrary determination would “render meaningless the Fourth Amendment’s protection of such suitcases.” *Id.* at 849.<sup>11</sup>

The Court of Appeals properly recognized that Mr. Randolph’s father had neither actual nor apparent authority to consent to a search of Mr. Randolph’s belongings (App. A at 5).

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<sup>11</sup> See also *United States v. Taylor*, 600 F 3d 678, 682 (CA 6, 2010) (holding that the permanent tenant of an apartment did not have apparent authority to consent to the search of a man’s shoebox being stored by the defendant in a closet there and noting that “the police would likely not have opened the closed shoebox if they believed it belonged to [the permanent tenant]. Rather, they opened the shoebox precisely because they believed it likely belonged to [the defendant] .... [A] reasonable officer in these circumstances would have substantial doubts about whether the shoebox was mutually used by both [the defendant] and [the permanent tenant].”); *United States v. Purcell*, 526 F 3d 953, 964 (CA 6, 2008) (holding that defendant’s girlfriend with whom he was staying in a hotel room did not have apparent authority to consent to the search of a backpack that defendant was storing in the room and noting that “[o]nce ambiguity erases any apparent authority, [t]he options for searching officers are simple: either they may get a warrant, or they may simply ask the would-be-consenter whether he or she possesses the authority to consent”); *United States v. Block*, 590 F 2d 535 (CA 6, 1978) (holding that a mother did not have the authority to consent to a search of her son’s footlocker, which he stored there).

However, it held that there was no constitutional violation, noting that “the fact that defendant left his belongings behind when he fled and never returned suggested that he abandoned his belongings and thus lacks standing to raise this issue” (App. A at 5). This finding is belied by both the factual record and the law. At trial, Kanisha testified that (1) she and Mr. Randolph were living together on the morning of December 10 (T1, 152); (2) during the night of December 9-10, Mr. Randolph packed his belongings in some garbage bags (T1, 164-65); and (3) she and Mr. Randolph had a conversation when he was packing up his belongings during which Mr. Randolph indicated that she and her kids could have “a weight bench [and] some stereo speakers, you know, little things of that nature and that was kind of old anyway,” but he specifically said, “I just want my clothes and shoes,” referring to the bags that he had packed (T1, 165). Thus, Mr. Randolph expressly said that he wanted his clothing and shoes, and he took steps to ensure they remained private by packing them into bags. Legally, a person does not abandon his reasonable expectation of privacy in his belongings unless the evidence “reasonably lead[s] to an exclusive inference of ‘throwing away.’” *People v Rasmussen*, 191 Mich App 721, 755 (1991). Mr. Randolph did not throw away his belongings. They were not in the trash. They were not left on a curbside. They were packed in bags *in his home*, and he had made it clear to his co-tenant that he had a privacy interest in those bags.

The fact Mr. Randolph left the house that morning does not vitiate his reasonable expectation of privacy in his bags. First, Kanisha testified that, in the past, they had fought, he had left the house, and returned (T1, 173). Mr. Randolph *lived at that house* as of that morning and he did not leave the home and his stuff for months, weeks, or even days. He was gone for less than one day when the police search occurred. To say that a person abandons his belongings when he leaves them packed up, *at his house*, for less than one day would be to stretch the abandonment doctrine far beyond any reasonable contours. Moreover, Kanisha testified that Mr. Randolph was trying to call her all day that day but she did not answer the phone (T1, 171-72). That is not the behavior of a person who has abandoned his property. Mr. Randolph never

“voluntarily discarded, left behind, or otherwise relinquished his interest in the property in question so that he could no longer retain a reasonable expectation of privacy [in it].” *People v Henry*, 477 Mich 1123, 1123 (2007) (brackets in original).

The circumstances under which Mr. Randolph left the home are also important. At trial, Kanisha testified that she armed herself with a knife that morning; she and Mr. Randolph struggled over the knife; Mr. Randolph told her “just drop the knife and I’ll leave;” and when she dropped the knife, he immediately picked it up and ran out (T1, 169-70). A person who runs from a home after a weapon is drawn on him is not someone who is abandoning his belongings.

Finally, as Taylor testified at the hearing, Mr. Randolph did in fact claim his belongings soon after his release from jail (H1, 32). All of the steps that Mr. Randolph took – from packing his belongings, telling his co-tenant that he specifically had an interest in those belongings, leaving the home without his belongings only after a weapon had been drawn on him, attempting to call his co-tenant repeatedly over the course of the day, and then retrieving his belongings at the first opportunity after his release from jail – demonstrate that he was continually trying to protect his expectation of privacy in his bags. There is nothing in this record to lead to “an exclusive inference of ‘throwing away.’” *Rasmussen, supra*. The Court of Appeals’s conclusion that he had abandoned his property was incorrect.

The Court of Appeals also erred when it rejected Mr. Randolph’s argument for plain error, because “the record does not contain sufficient information to determine whether the gun was likewise subject to suppression” (App. A. at 6). There was clear testimony on the record that the guns found at Mr. Randolph’s brother’s apartment were illegally obtained fruits of the prior unlawful search of Mr. Randolph’s belongings. The exclusionary rule “forbids the use of direct and indirect evidence acquired from governmental misconduct, such as evidence from an illegal police search.” *People v LoCicero*, 453 Mich 496, 508 (1996) (citing *Wong Sun v United States*, 371 US 471, 484 (1963)). The rule “reaches not only primary evidence obtained as a direct result of an illegal search or seizure, but also evidence later discovered and found to be derivative of an

illegality or ‘fruit of the poisonous tree.’” *Segura v United States*, 468 US 796, 804 (1984). The ammunition found at Mr. Randolph’s father’s house was “primary evidence obtained as a direct result” of the illegal search of his possessions and was, therefore, a suppressible fruit.

The firearms found at Mr. Randolph’s brother’s apartment, as well as the tests conducted on them, should have been similarly suppressed as derivative fruits of the poisonous tree. Bernritter testified at trial that he relied on the ammunition that was found in Mr. Randolph’s belongings at his father’s house to get a federal arrest warrant for Mr. Randolph for being a felon in possession of ammunition (T4, 39-42). The federal warrant in turn allowed the police to enter Mr. Randolph’s brother’s apartment to arrest him, and it was only because the police were in the apartment that they learned of Randolph’s brother’s parole status. This allowed the police to discover the firearms. (T4, 39-48). Thus, the discovery of the firearms in this case grew directly from the police’s illegal search at Mr. Randolph’s father’s home, and it was not too attenuated to merit suppression. The *Wong Sun* Court recognized that the discovery of evidence can “become so attenuated [from the initial Fourth Amendment violation] as to dissipate the taint” of that violation. 371 US at 478. The Supreme Court has set forth three factors that are relevant to the attenuation inquiry: the “temporal proximity” of the illegal search to the evidence obtained, “the presence of intervening circumstances,” and “particularly, the purpose and flagrancy of the official misconduct.” *Brown v Illinois*, 422 US 590, 603-04 (1975).

Although two months elapsed between the illegal search and the firearms discovery, courts have made it clear that this “first factor, time elapsed between the initial illegality and acquisition of evidence, cannot be evaluated in isolation of the other factors” and have emphasized that the “mere passage of time cannot serve to make tainted physical evidence admissible.” *United States v Najjar*, 300 F 3d 446, 478 (CA 4, 2002); *see also United States v Gross*, 662 F 3d 393, 402 (CA 6, 2011) (noting that this first factor is “most appropriate in determining whether a confession has been purged of taint” because the passage of time tends to suggest in that context that the confessor was exercising his or her free will); *State v Lujan*, 175

P 3d 327, 331 (NM 2007) (“We do not believe the mere passage of time, without more, should change our analysis.”). There were no intervening circumstances between the illegal search and the discovery of these firearms. The most important factor in the attenuation analysis is the purpose and flagrancy of the police misconduct. *Brown*, 422 US at 603-04. Here, the police knew that they did not have enough evidence to charge Mr. Randolph with murder, (T4, 44-45) and they went to his father’s house looking for incriminatory evidence to buttress their weak case. Despite the fact that there was no exigency, they bypassed the Fourth Amendment’s warrant requirement. And even though they had Mr. Randolph in custody, they chose not to ask *him* for permission to search his belongings. Nor was this a cursory search of a non-private area. The police knew that all of Mr. Randolph’s personal belongings had been delivered to his father’s house. In effect, they rummaged through his bedroom dresser drawers. These were Andrew Randolph’s possessions, not his father’s. The police knew that his father had not touched them (H1, 31). Their “[d]eliberate ignorance of conclusive ownership” is inexcusable. *Waller*, 426 F 3d at 849.

The law has been clear since 1978. *See United States v Block*, 590 F 2d 535, (CA 6, 1978); *see also People v Casey*, 102 Mich App 595, 604 (1980) (noting that police misconduct is “flagrant” when it is “extremely conspicuous” and “obvious” illegal). The police committed an obvious and egregious Fourth Amendment violation and it is thus necessary to suppress the derivative fruits; to hold otherwise “would render meaningless the Fourth Amendment’s protection” of personal containers stored in another’s home. *Waller*, 426 F 3d at 849.

***Trial counsel was constitutionally ineffective for failing to move to suppress this evidence.***

Trial counsel performed deficiently by failing to move to suppress the ammunition, the guns recovered at his brother’s apartment, and the testing that was conducted on those weapons as fruits of a violation of Mr. Randolph’s constitutional rights. *Strickland*, 466 US at 687. Trial counsel admitted he would have filed a motion to suppress the ammunition and the guns if he had known of any credible law to support it (H1, 45). Thus, the failure to file this motion was not

strategic. Rather, it was based on an erroneous belief that Mr. Randolph had no standing to assert a Fourth Amendment challenge (H1, 45-46). Notably, trial counsel admitted that he never did any legal research to determine if there were suppression issues with respect to the weapons and ammunition that were seized (H1, 45). Rather, he just assumed that Mr. Randolph would not have standing to object to these searches.<sup>12</sup> For the reasons discussed *supra*, Mr. Randolph had standing to object to these searches and the failure to challenge them was deficient performance.

Defense counsel's deficient performance was prejudicial under *Strickland*, 466 US at 687. With respect to the derivative fruits (the firearms and the testing conducted thereon), the prejudice is obvious. The prosecutor admitted to the jury that, "based on the evidence that [the police] had [that night] there was still not yet enough to hold Andrew Randolph on murder they thought" (T1, 140). It was not until the police recovered the firearms that they were able to even charge Mr. Randolph. And obviously, the weapons were critical evidence with respect to the felony firearm, discharging a weapon at an occupied building, and felon in possession charges.

Even without these secondary fruits, Mr. Randolph was prejudiced. The ammunition – the primary evidence obtained a result of this Fourth Amendment violation – was prejudicial to Mr. Randolph's case. The firearms were found in Mr. Randolph's brother's apartment in a room that the police admitted was the brother's room (T4, 43-44, 47). The jury was told that Mr. Randolph's brother was already on parole (T4, 48). The jury could easily have concluded that these weapons belonged to Mr. Randolph's brother and that Mr. Randolph did not possess them. The fact that ammunition had been found in Mr. Randolph's possession tended to support an inference that Mr. Randolph possessed weapons. After all, why would you have ammunition if you did not have something to fire it with? And knowing Mr. Randolph had firearms made it far

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<sup>12</sup> Trial counsel testified that he believed Mr. Randolph didn't have standing to object to the search of his brother (a parolee's) home (H1, 45). That is true, but Mr. Randolph is not alleging he has standing regarding his brother's apartment. Rather, he argues that the search of his brother's apartment was an illegal tainted fruit of the search of his belongings – a search that he *does* have standing to object to under *Waller*.

easier for the jury to believe that *he* was the one who shot up the house that night. The prosecutor invited the jury to draw that inference in closing: “[Jones] also told you ammunition was found in his possession ... everyone in this room agrees Andrew Randolph before this event was a felon and he was ineligible to carry a weapon or have ammunition; but he’s got 357 rounds. Why?” (T4, 86). This was impermissibly prejudicial evidence suggesting (a) Mr. Randolph was willing to violate the law by having ammunition even though he was forbidden from doing so and therefore would be willing to commit other crimes and, (b) because Mr. Randolph possessed ammunition, he likely possessed guns, including those found at his brother’s apartment.

The Court of Appeals summarily dismissed Mr. Randolph’s ineffective assistance claim by improperly conflating it with his plain error argument, noting that “defendant has failed to establish plain error in the admission of the evidence regarding the ammunition, defendant’s arrest on the warrant, and the guns, and thus his related ineffective assistance of counsel claims must also fail” (App. A at 10). For the reasons discussed *supra*, this conflation of the plain error and *Strickland* standards is both legally problematic and frequently recurring in Court of Appeals’ decisions and is itself reason for this Court to grant Mr. Randolph’s application.

- V. MR. RANDOLPH WAS DENIED A FAIR TRIAL WHEN EVIDENCE ABOUT AMMUNITION FOUND AT HIS FATHER’S HOUSE ON THE NIGHT OF THE SHOOTING AND EVIDENCE THAT A FEDERAL ARREST WARRANT HAD BEEN ISSUED FOR HIS ARREST WERE ADMITTED EVEN THOUGH THEY HAD NO RELEVANCE TO THE CHARGES AT ISSUE AND SERVED ONLY TO ESTABLISH HIS PROPENSITY TO VIOLATE THE LAW AND TO POSSESS WEAPONS. DEFENSE COUNSEL WAS CONSTITUTIONALLY INEFFECTIVE FOR FAILING TO OBJECT TO THIS EVIDENCE.

#### STANDARD OF REVIEW

The appropriate standard of review for this constitutional issue is *de novo*. *Trakhtenberg, supra*. Unpreserved errors are reviewed for plain error. *Carines, supra*.

## ARGUMENT

Both the due process guarantees of the United States and Michigan Constitutions require fundamental fairness in the use of evidence against a criminal defendant. US Const, Am XIV; Mich Const 1963, art 1, § 17; *see generally, Lisenba v California*, 314 US 219 (1941). MRE 404(b) prohibits the admission of “[e]vidence of other crimes, wrongs, or acts ... to prove the character of a person in order to show action in conformity therewith.” *See also People v Vandervliet*, 444 Mich 52, 74 (1993) (noting that other bad acts evidence must be offered for a non-propensity purpose, be relevant, and satisfy MRE 403 to be admissible).

Here, testimony about the ammunition found at Taylor’s house, and about the federal arrest warrant that was issued based on his possession of that ammunition, had no relevance other than to show that Mr. Randolph had a propensity to violate the law and had a propensity to possess weapons. The ammunition was not of the same caliber as that of the murder weapon, so it could not possibly have been used to commit the crime, and there were no charges in this case that Mr. Randolph illegally possessed ammunition. *Cf. Long v State*, 401 S W 2d 578, 579 (Ark 1966) (holding it was error to admit as evidence a pair of metal knuckles and a loaded pistol found on defendant’s person at the time of his arrest because “[t]here is no evidence that the weapons were in any manner relevant and connected with the crime charged in the information”). The only purpose for admitting this evidence was to portray the defendant as someone who violated the law and possessed weapons. *Cf. People v Mercado*, 502 N Y S 2d 87, 88 (1986) (finding error when prosecution admitted two photographs of defendant possessing weapons different from those at issue in the crime because “the photographs served no purpose other than to improperly portray the defendant as a gun-carrying criminal”). The prosecutor suggested as much when he argued in closing “everyone in this room agrees Andrew Randolph before this event was a felon and he was ineligible to carry a weapon or have ammunition; but he’s got 357 rounds. Why?” (T4, 86). If “the only relevance of the proposed evidence is to show

the defendant's character or the defendant's propensity to commit the crime, the evidence must be excluded." *People v Knox*, 469 Mich 502, 510 (2004).

The Court of Appeals erred in holding that this evidence was logically relevant to explain the police investigation (App. A at 6). It was not "so blended or connected" to the shooting "that proof of one incidentally involve[d] the other or explain[ed] the circumstances of the crime." *People v Sholl*, 453 Mich 730, 742 (1996). The prosecutor could easily have explained the police investigation without reference to this highly inflammatory and unfairly prejudicial evidence. Thus, any probative value that this evidence had in explaining the steps the State took as part of its investigation is "substantially outweighed by the danger of unfair prejudice." MRE 403; *see also People v Crawford*, 458 Mich 376, 398 (1998) ("[B]ecause prior acts evidence carries with it a high risk of confusion and misuse, there is a heightened need for the careful application of the principles set out in MRE 403."); *People v Pattison*, 276 Mich App 613, 620-21 (2007) ("[W]e caution trial courts to take seriously their responsibility to weigh the probative value of the evidence against its undue prejudicial effect....").

Trial counsel explained that he did not object to this testimony because Mr. Randolph wanted it to be admitted into evidence as part of his attempt to "attack the police" (H1, 44). However, as was true with the Blue View test, trial counsel does not appear to have ever suggested any alternative ways of handling the defense to his client. For the reasons discussed *supra*, counsel cannot blindly defer to an initial, uninformed statement from a lay client who has no legal training. It is incumbent on counsel to do the legal and factual investigation necessary and then inform the client of and advise him about the options. Trial counsel's failure to do that here constitutes ineffective assistance of counsel.

**CONCLUSION AND RELIEF SOUGHT**

For all of the above reasons, alone and collectively, Mr. Randolph respectfully requests this Court grant leave to appeal to address these issues or peremptorily reverse his convictions and remand for a new trial.

Respectfully submitted,

**STATE APPELLATE DEFENDER OFFICE**

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BY: \_\_\_\_\_

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